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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE OHIO STATE LIFE INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

RAY A. CLARK, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 8, 1960.

I

OPINIONS BELOW

The memorandum opinion and order of December 4, 1958 (R. 60a), and the supplemental opinion and order of March 16, 1959 (R. 63a) of the United States District Court for the Southern District of Ohio, Eastern Division, are unreported. The opinion of the United States Court of Appeals for the Sixth Circuit of February 8, 1960 (R. 91a), is reported at 274 F. (2d) 771. The order of the Court of Appeals denying petitioners' petition for rehearing (R.

124a) is unreported. True copies of said opinions and orders are appended to this petition in the Appendix hereto, at pages 25-45.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered February 8, 1960 (R. 89a). The petition of the appellants for a rehearing was denied by said court on March 23, 1960 (R. 124a). The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 U.S.C., which provides:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

III

QUESTIONS PRESENTED

This case involves the question of whether the shareholders of petitioner, The Columbus Mutual Life Insurance Company, can lawfully amend Article V of the charter of that company, prospectively. Article V of the Columbus Mutual Life Insurance Company charter is set forth at pages 46-47 of the Appendix to this petition.

Respondents, who are mutual plan, or participating, policyholders of said company sought to enjoin the company's shareholders from amending Article V. The District Court found that under the provisions of Article V equitable ownership of the surplus of the Columbus Mutual Life Insurance Company is vested in the company's mutual plan or participating policyholders and for that reason enjoined petitioners from taking any action for making effective the proposed amendment to Article V and from taking

any action in derogation of Article V as now constituted contrary to rights of such policyholders. The Court of Appeals affirmed. The questions presented are:

1. Can the shareholders of the Columbus Mutual Life Insurance Company amend Article V of that company's charter prospectively?

2. Do the mutual plan policyholders of the Columbus Mutual Life Insurance Company possess any vested contractual rights to the future and as yet unearned profits or surplus of that company by virtue of Article V of the company's charter?

3. Did the Court of Appeals err in holding that the proposed amendment to Article V of the Columbus Mutual Life Insurance Company charter would retroactively impair vested rights of the mutual plan policyholders of that company; and, if not, in what respect is said proposed amendment retroactive?

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are Article I, Section 10 of the United States Constitution; Article XIII, Section 2 of the Constitution of the State of Ohio, and Sections 1701.69 and 1701.71 of the Revised Code of Ohio. These constitutional and statutory provisions are set forth in the Appendix to this petition at pages 62-66.

V

SUMMARY STATEMENT OF MATTER INVOLVED

This action arises from a controversy between the shareholders, on the one hand, and the mutual plan policyholders, on the other, of the Columbus Mutual Life Insurance Company, as to the ownership of that company's surplus fund

and as to the power of the shareholders to amend that company's articles of incorporation. The basic facts, which are not in dispute, are as follows:

Petitioner, The Columbus Mutual Life Insurance Company (hereinafter sometimes called "Columbus Mutual"), is a legal reserve stock life insurance company organized and existing under the laws of the State of Ohio, with its principal place of business located in Columbus, Ohio (R. 5a). The company was incorporated in 1906.

The articles of incorporation of Columbus Mutual are set forth in the Appendix to this petition at pages 46-57. They provide, among other things, that:

(1) Columbus Mutual is authorized to write policies of life insurance on either the stock or mutual plan (Article III, Appendix, Page 46).

(2) The original authorized capital of Columbus Mutual was $100,000 divided into 1,000 shares of $100 par value each (Article IV, Appendix, Page 46).

(3) The business of the company and its corporate powers are vested exclusively in a board of directors, all of whom are elected by the company's shareholders, and not by its policyholders (Article VI, Appendix, page 48).

Since 1906, the company's articles of incorporation (hereinafter called the "charter") have been amended six times for the purpose, in each instance, of increasing the authorized capital. These amendments are set forth in the Appendix to this petition at pages 50-57. As a result of these various amendments, the company's present authorized capital is $500,000 divided into 5,000 shares of $100 par value each, all of which are issued and outstanding.

Except for the foregoing amendments there have been no other amendments to the company's charter, save for the proposed amendment involved in this action.

Columbus Mutual, since its incorporation, has been a successful and prosperous life insurance company. As of the close of the fiscal year, December 31, 1957, following the commencement of this action in the District Court, Columbus Mutual possessed (R. 25a):

(a) Insurance in force in the amount of	$479,919,138.00
(b) Unassigned surplus in the amount of	11,218,344.96
(c) Voluntary reserves in excess of required legal reserves in the amount of	6,795,453.59
(d) Total assets in the amount of	134,883,105.15
(e) Approximately 160,000 policyholders.	

On October 28, 1957, the shareholders of Columbus Mutual, including The Ohio State Life Insurance Company which owns 4,977, or 99.54%, of the 5,000 authorized and outstanding shares of Columbus Mutual, duly adopted an amendment to Article V of the Columbus Mutual charter. Article V of the Columbus Mutual charter is set forth in the Appendix to this petition at page 46. The text of the proposed amendment of October 28, 1957, to Article V is set forth in the Appendix to this petition at page 57.

Article V of the charter provides, in substance, that (1) annual dividends may be paid on outstanding stock at a rate not to exceed ten percent of the par value of the stock; (2) the directors may pay off and retire the stock at a price of $200 a share; (3) when all stock is retired the company shall be reorganized into a mutual company composed of the policyholders. In addition, Article V provides that, "Subject, however, to the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, the surplus

of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide."

The proposed amendment to Article V provides, in substance, that (1) the unassigned surplus of Columbus Mutual as of December 31, 1956, shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company and no dividends to any stockholder of the company shall be payable therefrom; (2) annually, for a period of twenty-five years, there shall be added to this special surplus from the earnings of the company a sum equal to the net earned interest rate on the mean invested assets after all taxes based on income; (3) regular dividends shall be paid from the earnings of the company to all participating policyholders without distinction, and additional dividends may be paid out of the special surplus for policyholders, as the directors in their sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of the amendment; (4) in the event of dissolution and liquidation at any time so long as any participating policies of the company in force on the effective date of the amendment are then in force, such policyholders shall be entitled to distribution from such special surplus, as then existing, in amounts representing their percentage interest in such surplus at the time of the effective date of the amendment; and (5) at the maturity of the last participating policy in force on the effective date of the amendment, the special surplus, as then existing, shall be permanently held for the protection of all policyholders and no dividends may at any time be declared to shareholders, except out of surplus over the above such amount.

This proposed amendment, following its adoption by the Columbus Mutual shareholders, was submitted to the Sec-

retary of State of Ohio for filing and was, in turn, submitted by him to the Attorney General of Ohio as required by Ohio law. The Attorney General of Ohio approved the amendment but advised the Secretary of State to refuse to record it because of the objections raised by respondents and in order that the rights of respondents, and other policyholders, could be adjudicated (R. 84a). The Attorney General's letter of transmittal and certification with respect to the amendment is set forth in the Appendix to this petition at page 60. Respondents, plaintiffs below, who are mutual plan policyholders of Columbus Mutual, commenced this action in the United States District Court for the Southern District of Ohio, Eastern Division, against petitioners, The Ohio State Life Insurance Company, Columbus Mutual, and the directors, officers and stockholders of both companies. Jurisdiction of the District Court was based upon the amount involved and because of diversity of citizenship and because the action arises under the Constitution of the United States.

In this action, respondents sought, on behalf of themselves and all other mutual plan policyholders of Columbus Mutual, declaratory judgment asking the District Court, in substance, to declare that (1) the mutual plan policyholders of Columbus Mutual are the beneficial owners of the surplus and voluntary reserves of that company, save for certain limited rights of the shareholders, by virtue of the provisions of Article V of the charter; (2) the beneficial interest in the surplus created by Article V is a vested right of contract protected against impairment by the contract clause of the United States Constitution; (3) the shareholders of Columbus Mutual have no power or authority to amend Article V of the charter.

Respondents filed their original complaint in the District Court on November 12, 1957, and thereafter filed their

amended complaint on March 28, 1958 (R. 5a). Petitioners, defendants below, filed their answer and counterclaim for declaratory relief on March 28, 1958 (R. 37a), and an amendment thereto on March 31, 1958 (R. 52a). In their counterclaim, petitioners prayed that the District Court declare, among other things, that the proposed amendment to Article V is a lawful amendment and in accordance with the Constitution and laws of the United States and of the State of Ohio; that the stockholders of Columbus have a legal right to amend Article V of the Columbus Mutual charter; and that Article V neither creates nor confers any vested rights of property to contract in of upon the policyholders of Columbus Mutual. Petitioners further requested the district court to declare their rights under the charter of Columbus Mutual and the Constitution and laws of Ohio.

On March 31, 1958, respondents filed their reply (R. 52a) to petitioner's amended answer and counterclaim, and on April 1, 1958 petitioners and respondents each filed their respective motions for summary judgment (R. 53a) pursuant to Rule 56 of the Federal Rules of Civil Procedure. Thereafter, the District Court granted the Superintendent of Insurance of Ohio leave to intervene as a party defendant and accepted the superintendent's answer to the amended complaint and his motion for summary judgment (R. 58a).

On December 4, 1958, the District Court rendered its memorandum opinion and order granting respondents' motion for summary judgment and overruling petitioners' motion for summary judgment (R. 60a). In this decision the District Court held that the equitable ownership of the surplus of Columbus Mutual, under the company's charter, is vested in its policyholders on the mutual plan, and that, in the aggregate, such policyholders a entitled to the whole of such surplus.

The District Court augmented its memorandum opinion and order with a supplemental opinion and order filed March 16, 1959 (R. 63a). In that supplemental order the District Court decreed:

1. That the surplus of Columbus Mutual belongs to its mutual plan policyholders subject only to certain limited stockholder rights;

2. *That the stockholders of Columbus Mutual cannot exercise their voting power to relieve their stock of the restrictions and limitations of Article V of the company's charter;*

3. That the proposed amendment, if permitted to become effective, would deprive the mutual plan policyholders of vested property rights in the surplus without due process of law.

The District Court, by its supplemental opinion and order perpetually enjoined petitioners from taking any action to make effective the proposed amendment and from taking any action in derogation of the terms of Article V "as now constituted" contrary to the rights of the policyholders under that article "as such rights are declared herein." The District Court effectively prohibited petitioners from ever prospectively amending Article V of the Columbus Mutual charter.

Petitioners filed their notice of appeal from the foregoing decisions of the District Court in the United States Court of Appeals for the Sixth Circuit on March 20, 1959 (R. 67a). The Court of Appeals heard the case upon oral argument on December 16, 1959 (R. 88a) and, on February 8, 1960, rendered its decision affirming the District Court (R. 91a).

In its opinion of February 8, 1960, the Court of Appeals held that Columbus Mutual is a stock company which issues some of its policies on the mutual plan. The court further

held that the provisions of Article V of the Columbus Mutual charter control the extent to which the usual rights of shareholders have been curtailed, and the court construed Article V as giving to the mutual plan policyholders "a vested contract right to the beneficial interest in the surplus, subject to the prior limited claims of the stockholders therein." The Court of Appeals went even further than the District Court and held that such vested right includes not only the surplus of Columbus Mutual but also its profits, which are currently represented by the company's voluntary reserves. It is significant to note that the court held that this beneficial interest in surplus and profits does not arise from the provisions of the insurance policies held by respondents and other mutual plan policyholders, but is, rather, a proprietary right which exists solely by virtue of Article V of the charter and in addition to rights acquired by them under the terms of their insurance policies.

In its opinion the court recognized the reserved statutory power in Ohio to amend corporate charters, but held that this reserved power does not include the right on the part of the state, acting through the stockholders of a corporation, to amend the charter retroactively in a way which will impair vested rights previously acquired under a contract between the corporation and parties other than stockholders. The court then held that the rights which the policyholders have in the surplus and profits of Columbus Mutual by virtue of Article V, are rights protected by Article I, Section 10 of the United States Constitution, and that the proposed amendment to Article V would be an impairment "of the contract obligations of the corporation running to the policyholders."

On February 27, 1960, petitioners filed their petition for rehearing in the Court of Appeals (R. 103a), which petition was denied by the court on March 23, 1960 (R. 124a).

VI

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals involves a far-reaching matter of Ohio corporation law which affects not only the interests of The Columbus Mutual Life Insurance Company, a large Ohio insurance company, and its 160,000 policyholders, but also the interests of Columbus Mutual's principal shareholder, The Ohio State Life Insurance Company, and that company's policyholders, numbering some 100,000, and its 1,230 stockholders.

The decision of the Court of Appeals should be reviewed because it erroneously construes Article V of the Charter of Columbus Mutual, an Ohio stock company, as a third party beneficiary contract which vests in that company's mutual plan, or participating, policyholders a right not only to the company's *existing* surplus and profits but also such contractual right in the company's *future* and as yet unearned surplus and profits. *In so holding, the Court below has decided an important and far reaching question of Ohio law in a way which is in direct conflict with the constitution and law of that state, and has extended the application of the contract clause of the United States Constitution in a way which is in conflict with the decisions of the Supreme Court of Ohio and of this Court.*

At the outset, petitioners emphasize to the Court that they do not, by this petition, seek a review of the lower court's determination that respondents, and the other mutual plan policyholders of Columbus Mutual, possess a vested beneficial interest in the company's *existing* surplus and profits, including its voluntary reserves, by virtue of Article V of the company's charter.

The Court of Appeals, however, in affirming the permanent injunction decreed against petitioners by the District Court, goes much further and, in substance and effect, has

construed Article V as a third party beneficiary contract under the terms of which the company's participating policyholders are held to have a vested right of contract in and to the company's *future* and as yet unearned surplus and profits. This contractual right to future profits, the lower court has held, is a vested right which is protected against impairment by Article I, Section 10, of the United States Constitution. The lower court has held that petitioners, the shareholders of Columbus Mutual, can never amend Article V of the charter prospectively, notwithstanding the reserved power of amendment contained in Article XIII, Section 2, of the Ohio Constitution, and conferred upon shareholders by Sections 1701.69 and 1701.71 of the Revised Code of Ohio. Petitioners submit that the decision conflicts directly with decisions of the Supreme Court of Ohio and is erroneous for the following reasons:

1. Assuming for the purpose of this petition, that, as the lower court has held, Article V of the Columbus Mutual charter constitutes a third party beneficiary contract from which the mutual plan policyholders derive a vested interest in the company's *existing* surplus and profits, that right of contract attaches only to surplus and profits actually earned and accumulated. It does not and cannot attach to future surplus and profits which may, or may not, be earned at some future time and which, at the present, are purely contingent.

The foregoing proposition is fully supported by the language of Article V itself, which even the lower court stated, at one point in its decision, has reference to surplus "when and as accumulated". This construction of Article V is further supported by the decisions of the Supreme Court of Ohio in *State ex rel Ellis v. Union Central Life Insurance Company*, 13 Ohio C. C. R. (n. s.) 49, Affd. w/o opn. 84 Ohio St., 459 (1911), and in *Belden v.*

Union Central Life Insurance Co., 73 Ohio App., 267, affd. 143 Ohio St., 329 (1944). These two cases involved an Ohio legal reserve stock life insurance company which wrote mutual plan insurance policies and whose by-laws limited the amount of dividends which shareholders of the company could receive. It was expressly held in these cases that an Ohio stock insurance company is under no duty to either create or to maintain a surplus. As the Ohio Court of Appeals pointed out in its decision in the *Belden* case, supra, the claim of a mutual plan policyholder to a vested right of contract in the insurer's surplus was tantamount to a claim that a participating policyholder "has a vested right to uninterrupted continuance of insurer's capital structure". This contention the court flatly rejected in its decision, which was affirmed by the Supreme Court of Ohio. See, also, *Russell v. Pittsburgh Life and Trust Co.*, 132 App. Div., 217; 116 N. Y. Supp., 841 (1909), wherein it was held that a mutual plan policyholder of a stock life insurance company, whose business was conducted on the mutual plan and whose charter required that surplus, above a limited dividend to shareholders, was to be equitably applied for the benefit of policyholders, had no standing to sue to restrain a transfer of the assets of the company to a foreign stock insurance company pursuant to a contract for the merger of the two companies.

The import of the above-cited decisions is simply that there can be no vested right of contract in a purely contingent fund such as future surplus or profits which have not accrued. Nor can mutual plan policyholders of an Ohio stock life insurance company claim a vested right to the uninterrupted continuation of their insurer's capital structure. The validity of these propositions is in no way diminished by the decision of the Ohio Court of Appeals in *Bell v. Union Central Life Insurance Co.*, 14 Ohio C. C. R.

(n. s.) 385, (1911), relied upon by the court below. That case, which was never affirmed by a majority of the Ohio Supreme Court (see, 87 Ohio St., 475, 92 Ohio St., 521), held only that the prior *quo warranto* proceeding, *State ex rel. Ellis v. Union Central Life Insurance Co., supra.*, was not a bar to a subsequent policyholder action against the company. The *obiter dictum* of the Court of Appeals decision in the *Bell* case, supra, neither states nor implies that the mutual plan policyholders involved therein had any contractual right, by virtue of their insurer's charter, in the insurer's future profits. Petitioners respectfully submit that as to that question the *Ellis* case, supra, and the later *Belden* case, supra, are controlling. The decision of the Court of Appeals in the case at bar is in direct conflict with these decisions of the Supreme Court of Ohio.

2. The Court of Appeals, by its decision in this case, has erroneously curtailed the scope and effect of Article XIII, Section 2 of the Ohio Constitution and Sections 1701.69 and 1701.71 of the Revised Code of Ohio.

Article XIII, Section 2 of the Ohio Constitution provides, in relevant part, that:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

This provision was adopted in Ohio in 1851, as a result of the decision in *The Trustees of Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518 (1819). It has been a part of the Ohio Constitution ever since and has never been amended. The General Assembly of Ohio has delegated this reserved power of amendment to the stockholders of Ohio stock companies. In 1906, when Columbus Mutual was incorporated, this power of amendment was conferred upon stockholders by Section 3238a of the Revised Statutes of Ohio, 83 Ohio Laws, 193 (1886). In 1957, when the pro-

posed amendment to Article V was adopted by petitioners, the power to amend was conferred upon stockholders by Section 1701.69 and 1701.71 of the Revised Code of Ohio (126 Ohio Laws, 432), which sections are still in effect today.

It is well established in Ohio, and elsewhere, that where power to amend corporate charters is reserved to the state by constitutional provision, and where the state has delegated that reserved power to corporate shareholders by statute, such constitutional and statutory provisions enter into and form a part of every charter granted thereafter, and are fully binding upon corporate shareholders, corporate directors and, as in the case at bar, third persons who claim rights as third party beneficiaries by virtue of charter provisions. *Northern Central Railway Company v. Maryland*, 187 U. S., 258 (1902); *Louisville Water Co. v. Clark*, 143 U. S., 1 (1892); *Belden v. Union Central Life Insurance Co.*, 143 Ohio St., 329 (1944); *Schaffner v. Standard Boiler and Plate Iron Co.*, 150 Ohio St., 454 (1948); *Williams v. National Pump Corp.*, 46 Ohio App., 427, dism. for want of court, q., 126 Ohio St., 457 (1933). *Grobe v. Erie County Mutual Insurance Co.*, 57 N. Y. Supp., 292, affd. w/o opn., 169 N. Y., 613 (1902); 13 Am. Jur., Corporations, Sec. 90, p. 234.

In short, every shareholder and every policyholder took his respective share of stock or policy of insurance with the full knowledge, so far as the law is concerned, that the State of Ohio, and through it the shareholders of Columbus Mutual, had full power and authority to amend the company's charter prospectively.

While it is true that the reserve power of amendment cannot be exercised to impair or destroy rights of contract which vested prior to the exercise of the power, it is equally true that the reserve power can be legitimately exercised

to effect prospective changes in the corporate structure, as shown by the above-cited authorities.

The Court below, having erroneously determined that Article V confers vested contractual rights to future surplus and profits upon the mutual plan policyholders of Columbus Mutual, further determined that the proposed amendment to Article V would retroactively impair such rights, and on that basis the lower court affirmed the District Court's permanent injunction which restrains the Columbus Mutual shareholders from ever amending Article V. In support of these determinations, the Court of Appeals relied upon *Coombes v. Getz*, 285 U. S., 434 (1932); *International Steel & Iron Co. v. National Surety Co.*, 297 U. S., 657 (1936); *Wheatley v. The A. I. Root Co.*, 147 Ohio St., 127 (1946); *Schaffner v. Standard Boiler and Plate Co.*, 150 Ohio St., 454 (1948) and *Partridge v. Michigan Mutual Windstorm Insurance Co.*, 256 Mich., 76 (1931).

Petitioners respectfully but emphatically submit that not one of these cases, cited by the Court below, is authority for the proposition that the mutual plan policyholders of Columbus Mutual possess a vested contractual right, by virtue of Article V, in the company's future surplus and profits, or to the uninterrupted continuation of the company's present corporate structure. In short, not one of these cases is authority for the proposition that the shareholders of Columbus Mutual cannot amend Article V of their company's charter prospectively, as they are now enjoined from doing.

Coombes v. Getz, supra, involved an action by the assignor of a corporate creditor under a California constitutional provision which imposed personal liability on corporate directors in certain circumstances. While the creditor's action against a director, under this provision, was pending, the provision was repealed and as a result thereof the credi-

itor's action was dismissed. This Court held that the creditor's right of action to enforce the director's liability vested prior to the repeal of the provision creating such liability. There was, as the opinion clearly shows, no holding that a corporate charter cannot be amended prospectively. As Mr. Justice Cardozo aptly pointed out in his dissent to the Court's decision, "the claim of an irrepealable contract cannot be predicated upon a contract which is repealable."

International Steel & Iron Co. v. National Surety Co., supra., held only that the obligation of a highway contractor's bond given to the state to secure payment to materialmen is unconstitutionally impaired by a subsequently enacted statute which released and discharged the obligation of the bond and substituted therefor the obligation of another bond without the acquiescence of the obligee. Again, there was no holding that the statute in question impaired bonds issued after its enactment.

Wheatley v. A. I. Root Co., supra, held that a corporate charter, under the terms of which preferred shareholders were granted a right to receive dividends at the rate of five per cent per annum, which dividends were cumulative, could not be amended so as to deprive such shareholders of dividends which *had accrued but which were unpaid* at the time the charter amendment was adopted where the statute under which the amendment was adopted had been enacted subsequent to the granting of the charter and to the issuance of the preferred shares.

Schaffner v. Standard Boiler & Plate Iron Co., supra., involved a plan of corporate recapitalization similar to that involved in the *Wheatley* case, supra. It was here held that the corporation was fully authorized, under the reserve power and statutes of Ohio, to amend its capital structure with the limitation only that in so doing it did not impair

the right of preferred shareholders to receive their *accumulated but unpaid* dividends.

Partridge v. Michigan Windstorm Insurance Co., supra, involved a mutual casualty insurance company which had no stockholders and which was owned exclusively by its policyholders. The company's charter authorized the directors to amend or repeal the company's by-laws or charter. The company insured plaintiff's wood silo, under a by-law authorizing such insurance, and thereafter the directors amended the by-law so as to disclaim any liability for loss of wood silos. The court held only that the plaintiff's insurance policy was not affected by the amendment.

Not one of the foregoing cases is authority for the proposition that the mutual plan policyholders of Columbus Mutual possess, by virtue of Article V, a vested right in a future surplus which the company is under no duty to either earn or create, or a right to the perpetual continuation of Columbus Mutual's present capital and corporate structure. It is earnestly submitted that the lower court's reliance upon the foregoing decisions is misplaced.

3. Petitioners respectfully submit that the lower court's decision, insofar as it holds that the mutual plan policyholders of Columbus Mutual possess a vested right in the company's future surplus and profits by virtue of Article V, is in direct conflict with the following cases wherein it has been held that, under a constitutionally reserved power of amendment, the corporate structure of a corporation can be altered prospectively.

For example, it was held by this Court in *Wright v. Minnesota Mutual Life Insurance Co.*, 193 U.S. 657 (1904), that legislative authority to change the plan of the business done by a life insurance company from the assessment plan to the legal reserve, flat premium plan does not work a violation of the company's contract with those policyholders who

failed to change to the new plan. So, too, in *Polk v. Mutual Reserve Fund Life Association*, 207 U. S. 310 (1907), it was held that contract obligations between an association insuring lives on the cooperative plan and its members are not unconstitutionally impaired by the reorganization of such association as a mutual level premium company under a state statute. Each of these cases, it will be noted, involved a mutual insurance company which was owned by its policyholders. In each of these cases it was held that the reserved power of amendment, in force when the corporations were incorporated, would sustain, as against an objection founded on the contract clause of the Federal Constitution, state statutes which permitted a prospective alteration of the companies' corporate structure without the consent of the policyholder-members.

The Supreme Court of Nebraska held, in the case of *In Re Leininger*, 115 Neb. 801, (1927), held that there was no impairment of the contractual rights of policyholder-members of the mutual insurance company which, under the reserved power of amendment and state statute, converted from a mutual company to a stock company. A similar conversion of a mutual company to a stock company was upheld in *Grobe v. Erie County Mutual Insurance Co.*, supra.

In *Belden v. Union Central Life Insurance Co.*, supra, the Supreme Court of Ohio approved the conversion of a stock life insurance company into a mutual company pursuant to the reserved power of amendment and state statute. In *Schaffner v. Standard Boiler & Plate Iron Co.*, supra., the same court approved a plan of corporate recapitalization which, among other things, deprived preferred shareholders of the future right to cumulative preferred dividends which they had enjoyed prior to the recapitalization under the charter of their company.

Although the foregoing cases are distinguishable on their respective facts from the case at bar, it will be noted that in every one of these cases it was held that there was no constitutional objection to the exercise of the reserve power of amendment even though the amendment, in each instance, effected a radical, prospective change in pre-existing contract rights conferred by charter and by stock certificates or insurance policies. These cases are ample authority for the proposition that neither shareholders nor third persons claiming contractual rights under corporate charters have any constitutionally protected right to future surplus or profits of a corporation, where the state has reserved the power to amend such charters and has delegated that authority by statute to the members of a corporation. The decision of the court below in this case is in direct conflict with this well and long-established rule.

4. The lower court's decision in this case is of far reaching effect because, in erroneously extending the scope of the contract clause of the United States Constitution, the lower court has restricted, and to a large measure nullified, the reserved power of amendment provided for in the Ohio Constitution and delegated to the shareholders of Ohio corporations by Ohio statutes.

Petitioners respectfully point out to the Court, that the decision of the Court of Appeals not only affects the shareholders and 160,000 policyholders of Columbus Mutual and the right of the former to amend their corporate charter under Ohio law; but it will also have far reaching and disastrous effects on the right of shareholders of all other Ohio stock companies, and of the shareholders of stock companies of other states wherein a reserved power of amendment has been delegated to shareholders, to amend their corporate charters. For example, the usual Ohio stock life insurance company could not convert to a mutual company without

a 100% vote of its stockholders, despite the Ohio mutualization law. Furthermore, under the lower court's decision, an Ohio corporation, whose original charter provided for only one class of stock, could never amend its charter to increase the number of shares of that class, or to create other classes of stock such as cumulative preferred, unless every one of the original shareholders consented, because any such increase or creation of new classes of stock would necessarily diminish the aliquot interest of each of the original shareholders in the company's future earnings. By like token, it would, under the lower court's decision, be unlawful to amend a corporate charter so as to terminate the right of the holders of outstanding cumulative preferred shareholders to future cumulative preferred dividends not yet earned or accrued at the time of adoption of such an amendment. Yet all such prospective amendments are specifically authorized by Ohio statute, and in *Schaffner v. Standard Boiler & Plate Iron Co.*, supra, and in *Williams v. National Pump Co.*, supra, it was expressly held by, respectively, the Supreme Court of Ohio and the Ohio Court of Appeals, that cumulative preferred shareholders had no vested contractual right, by virtue of charter provisions, to dividends which, at the time of the adoption of the charter amendments involved therein, were not yet earned or accrued. Petitioners submit that the lower court's decision in the case at bar cannot be squared with these decisions of the Supreme Court of Ohio and of the Ohio Court of Appeals. It is no answer to say that in the latter, the Ohio statutes gave the dissenting shareholder a right to the fair market value of his shares, for as the Court of Appeals pointed out in its decision in this case, when the impairment of a vested right is involved "it is not a

question of degree, under the Constitution it is not to be impaired at all". It is to be emphasized, in the case at bar, that, as the lower court held, Columbus Mutual is not a mutual insurance company but a stock insurance company which writes some of its policies on the mutual plan. It necessarily follows that the company's policyholders are not stockholders, or members of the company. They are creditors of the company. *Belden v. Union Central Life Insurance Co.*, supra. As such, their rights in the company are governed primarily by the terms of their respective insurance contracts. It is important to note that the proposed amendment to Article V in no way affects or disturbs any of the terms or conditions contained in the insurance policies issued by Columbus Mutual to respondents and its other mutual plan policyholders.

Although this case involves an Ohio stock insurance company, it should be observed that the far reaching effect of the decision below extends not only to the right of shareholders to amend prospectively their corporate charters, but it also is authority for the nullification of the statutes of every state which authorize the conversion of a mutual life insurance company into a stock company. Under the decision below, any such conversion would necessarily operate as an unconstitutional impairment of vested policyholder rights unless every single policyholder-member consented thereto. The lower court's decison is thus in direct conflict with *In re Leininger*, supra and *Grobe v. Erie County Mutual Insurance Co.*, supra.

Such an application of the contract clause of the United States Constitution at the expense of constitutionally reserved power of the state to amend corporate charters constitutes a far reaching and revolutionary departure from existing law, and conflicts directly with the previously announced decisions of this Court and of the Supreme Court

of Ohio. *Wright v. Minnesota Mutual Life Insurance Co.*, supra, *Polk v. Mutual Reserve Fund Life Association*, supra, *Belden v. Union Central Life Insurance Co.*, supra, *Schaffner v. Standard Boiler & Plate Iron Co.*, supra.

CONCLUSION

To summarize, petitioner asks this Court to review but one narrow question. Petitioner does not ask this Court to review the decision of the lower court in holding that these policyholders have a vested beneficial third party contract interest in the entire surplus of Columbus Mutual, aggregating now some twelve million dollars, and also in the voluntary reserves aggregating now some seven million dollars in addition, all of which is the result of the successful management of this company by its Board of Directors elected by the stockholders, with which these policyholders had nothing whatsoever to do.

The single narrow question which we ask this Court to review is the ruling of the Court of Appeals affirming the District Court which enjoins any prospective amendment of Article V by the stockholders, thus vesting in these policyholders third party beneficiary contractual rights in future and as yet unearned profits, profits which if earned will be the result of efficient management in which these policyholders will have no voice and over which these policyholders will have no control whatsoever.

The unique aspects of Article V cannot obscure the far reaching effect of the lower court's decision on the state's reserve power of amendment.

Under the decision as it now stands on this single point, stockholders of any Ohio corporation may contract with the corporation so as to confer prospectively vested third party beneficiary contractual rights in any group of third parties, rights which do not arise out of contracts of such group

with the corporation and which may not be prospectively changed or impaired. If this decision is allowed to stand on this point, it is indisputable that stockholders of every Ohio corporation may contract with the corporation, as one of the direct parties to a two-party contract, so as to confer upon themselves prospectively vested contractual rights to future unearned profits of the corporation, thus substantially nullifying the Ohio Constitution's reserve power to amend corporate charters, and establishing direct authority for the substantial nullification of similar constitutional provisions of most if not every other state in the Union, which, since the decision in the *Dartmouth College* case, has reserved the power to amend corporate charters.

It is but rarely that this Court has presented to it a question for review of such far reaching import presenting a clash between the Federal Constitution and the constitution of most if not every state of the Union.

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Filed December 4, 1958]

This cause came on to be considered upon cross-motions for summary judgment filed herein by the original parties to the Clark case on April 1, 1958. Counsel for the plaintiffs, Clark et al. and for defendants, Ohio State Life et al., are agreed that there is no genuine issue as to any fact material to a decision on cross-motions, and that judgment should be entered as a matter of law; but there agreement ends. Each side claims entitlement to such judgment.

Upon agreement of all counsel, the motion of the Superintendent of Insurance of the State of Ohio for leave to intervene was sustained. The intervenor while not joining in either motion takes the position that one or the other of the motions for summary judgment should be granted, intervenor's interest being confined to the application of the insurance laws of the State of Ohio.

The motions of plaintiffs in Civil No. 5149, Keller et al. v. Ted W. Brown et al., to have that case consolidated with Civil No. 5146, the Clark case, and to be joined as moving parties on the summary judgment issue having been sustained, the Keller case plaintiffs are aligned with plaintiffs in the Clark case, and they ask that summary judgment be granted as a matter of law in favor of all plaintiffs.

The Court having carefully considered this matter, the voluminous and able briefs filed, and after numerous hear-

ings, and being fully advised in the premises, finds as counsel have agreed that there is no genuine issue as to any material fact and that judgment should be granted as a matter of law.

The basis for this litigation is quite apparently the surplus accumulated by The Columbus Mutual Life Insurance Company, and decision of the question of ownership of those funds between stockholders on the one hand or policy holders on the other, is dispositive of this action.

In the case of United States Life Insurance Co. v. Spinks, 126 Ky., 405, 422, the court had this to say in defining "surplus" and fixing its ownership:

> "The aggregate of all the excessive collections of premiums in that year constitute that year's accumulation of 'surplus.' This fund is sometimes called, or miscalled 'undivided profits' or 'surplus earnings' or the like. But it represents only the aggregate of overcharges of premiums assessed against the policy holders. The greater it is, the greater the unnecessary exaction that has been made by the insurance company from its policy holders in carrying on the business of collecting from them a sufficient sum to pay all of them the sums agreed at their deaths and in the meantime to pay all the legitimate and necessary expenses of maintenance. If the insurance company doing the business were only a stock company, in the absence of statutory regulation, all 'surplus' or 'profits' would belong to the stockholders. It would represent that such more charged for doing the business than it cost, and would be properly profit. But, where the company is a mutual, being conducted on the plan of giving the cheapest safe insurance to its members, all surplus ought to belong to the members, the policy holders. For in a purely mutual company there are no stockholders, and no one else therefore to whom the surplus could go than its policy holders. And it should in equity go to those who had contributed it * * * In mixed companies—that is, partly stock and partly mutual—the act creating them usually designates the maximum per cent that shall be paid in

> dividends to the stock, the residue of 'surplus' or 'net earnings' going to the contributing policy holders. * * * The 'surplus' was what was left after paying the dividends to stockholders, all expenses and all losses, and after providing for all death claims and for maintaining the reserves. Hence, this 'surplus' should be treated as if the company were purely a mutual company."

The Court is of the opinion that the application of the above-quoted language to the instant case will accomplish a fair, just and equitable result. It is certainly clear that Columbus Mutual is not "only a stock company" nor is it "a purely mutual company." The nature of its entity lies somewhere in between, and can be best described, perhaps, as one of the so-called "mixed companies." However, it is immaterial how the entity is characterized, since it is not "only a stock company." Because of the restrictions placed upon the stock of Columbus Mutual in its articles of incorporation and printed upon the face of issued stock certificates, the Court is of the opinion that the principles of the Spinks case, supra, should apply. "Hence, this 'surplus' should be treated as if the company were purely a mutual company," and the surplus "should in equity go to those who had contributed it." This result affords a fair, reasonable and unstrained construction to the language of Article V of Columbus Mutual's articles of incorporation "* * * the suplus of the company shall belong to the holders of policies on the mutual plan, * * *." The Court is of the opinion that the equitable ownership of the surplus of Columbus Mutual under the Articles is vested in its policy holders on the mutual plan, that is, in the class of which these plaintiffs are representatives; is the aggregate they are entitled to the whole.

Based upon the foregoing, and upon the entire files and records in this consolidated action, the Court finds that

defendants' motion for summary judgment is not well taken and should be and hereby is overruled.

The Court further finds that plaintiffs' motion for summary judgment is well taken and should be and hereby is sustained and judgment should be entered for plaintiffs and against defendants as a matter of law.

However, pursuant to the request of the intervenor, Superintendent of Insurance of the State of Ohio, contained in his memorandum filed May 2, 1958, the Court will withhold the entry of final judgment herein until all parties have had an opportunity to be heard on the propriety of remedies to be granted to the plaintiffs.

/s/ Underwood
District Judge

SUPPLEMENTAL OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Filed March 16, 1959]

On December 4, 1958, the Court entered its memorandum opinion and order upon the cross-motions for summary judgment then pending herein. In that order, the Court overruled defendants' motion for summary judgment and sustained the summary judgment motion of the plaintiffs in the Clark case, Civil No. 5146, in which motion the plaintiffs in the Keller case, Civil No. 5149, had previously been permitted to join as moving parties. Also in its opinion and order of December 4, 1958, the Court acting pursuant to the request of the intervenor, the Superintendent of Insurance of the State of Ohio, withheld the entry of final judgment herein so that all parties might have an opportunity to be heard on the propriety of remedies to be granted.

However, at a hearing held in open court on January 9, 1959; notice thereof having been given and counsel for all parties being present, the aforementioned request of the intervenor was withdrawn.

Now, therefore, this matter is before the court for consideration of the final judgment to be entered herein, and the Court being fully advised in the premises finds as follows:

(a) That the plaintiffs in the Clark case, Civil No. 5146, are mutual plan policyholders of The Columbus Mutual Life Insurance Company and bring said action as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure on behalf of themselves and all other mutual plan policyholders of said company;

(b) That the Keller case, Civil No. 5149, was similarly brought as a class action pursuant to said Rule 23(a) by the plaintiffs Keller, Purvis and Johnston, later joined by the plaintiffs Eberst and Strunk;

(c) That the Court has jurisdiction of the parties and the subject matter of this consolidated action wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between citizens of different states; and that there is no just reason to delay the entry of final judgment herein.

Based upon the foregoing and upon the memorandum opinion and order entered December 4, 1958, which opinion and order shall be considered with this supplemental opinion and order as the final judgment of the Court, all of which shall be effective from the date hereof, it is ordered, adjudged and decreed that summary judgment be and it hereby is entered in favor of the plaintiffs and against the defendants, and therefore the Court does hereby declare as follows:

(1) That the surplus of The Columbus Mutual Life Insurance Company belongs to its mutual plan policyholders,

subject only to the limited rights of its stockholders to receive dividends not to exceed 10% per annum on the par value ($100.00 per share) of their stock and to receive $200.00 per share for their stock upon its retirement.

(2) That The Ohio State Life Insurance Company and the individual defendants who are stockholders of The Columbus Mutual Life Insurance Company cannot exercise their voting power to relieve their stock of the restrictions and limitations of Article V of the charter of Columbus Mutual to which restrictions and limitations they consented and by which they agreed to be bound when they acquired said stock; and

(3) That the mutual plan policyholders of Columbus Mutual would be deprived of vested property rights in the surplus without notice, acquiescence and due process of law if the proposed amendment were permitted.

In addition to the foregoing declarations, the Court is of the opinion that injunctive relief herein is warranted upon the facts admitted in the pleadings and upon the findings of the Court and the agreement of all counsel that there is no genuine issue as to any material fact. The Court is of the further opinion that Rule 52 of the Federal Rules of Civil Procedure, to the extent that it applies herein, has been sufficiently satisfied without necessity for further findings.

Therefore, it is ordered, adjudged and decreed that the defendants, The Ohio State Life Insurance Company, the Columbus Mutual Life Insurance Company, Frederick E. Jones, Frank L. Barnes, I. Malcolm McCampbell, Thomas F. Boss, David C. Morgan, Howard W. Kraft, Derrol R. Johnson, Allen G. Aigler, Dr. Rees E. Tulloss, Frank A. Burgess, Stanton G. Prentiss, Robert H. Campbell, Walter F. Eberle, Robert N. Lupfer, Edward A. Sauer, Charles F. Brany, W. Lyman Case, Ben F. Hadley, Donald J. Hoskins, Carl Mitcheltree, Donald C. Power, Jay Show Sr., and Danforth

E. Ball Jr., and Ted W. Brown, Secretary of State of the State of Ohio, and each of them, and their agents and servants and all others acting in their aid or assistance or conjunction, or in aid or conjunction of or with any of them, are hereby perpetually enjoined and restrained from:

(A) Taking any action to make effective the proposed amendment to Article V of the Charter of The Columbus Mutual Life Insurance Company; or

(B) Taking any action in derogation of the terms of said Article V as now constituted contrary to the rights of the plaintiffs under said Article V as such rights are declared herein.

It is further ordered, adjudged and decreed that the Court does hereby retain jurisdiction of this consolidated action for all necessary purposes, including modification of the aforesaid injunctive order, if warranted; consideration of plaintiffs' requests that they be awarded their costs and disbursements, including reasonable attorney fees; and all other ancillary or remedial matters that may arise.

Settlement of judgment entry hereof not required.

/s/ Underwood
District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed February 8, 1960]

Before: McAllister, chief judge, Miller, circuit judge, and Brooks, district judge.

MILLER, Circuit Judge. This declaratory judgment action was brought by the appellees on behalf of themselves as mutual plan policyholders of The Columbus Mutual Life Insurance Company and on behalf of The Columbus Mutual Life Insurance Company itself, hereinafter called

Columbus Mutual, and on behalf of all mutual plan policyholders of that company against the appellant, Ohio State Life Insurance Company, hereinafter called Ohio State, and directors, officers and stockholders of both companies. It involves the conflicting claims of the mutual plan policyholders of Columbus Mutual and the stockholders of that company, including its principal stockholders, Ohio State, to the beneficial ownership of the surplus of Columbus Mutual, which, together with certain reserves and net profits for the year 1957, totaled as of December 31, 1957, $49,184,658.66. Jurisdiction is based upon the amount involved and because of diversity of citizenship and because the action arises under the Constitution of the United States. The District Judge found in favor of the mutual plan policyholders, from which ruling this appeal was taken.

The facts are not in dispute. Columbus Mutual is a legal reserve life insurance company, organized in 1906 under the laws of Ohio as a stock insurance company, with an authorized capital of $100,000.00 divided in 1,000 shares of $100.00 par value each. The original articles were amended by the company's shareholders to increase the company's authorized capital stock in the years 1910, 1913, 1920, 1921 and 1922. The company's present authorized capital is $500,000.00, divided in 5,000 shares of $100.00 par value each, all of which are issued and outstanding. Except for these increases of capital stock there have been no other amendments to the Columbus Mutual charter.

Columbus Mutual has been a well managed and successful life insurance company. As of December 31, 1957, it had approximately 160,000 policyholders who owned insurance in force in the amount of $479,919,138.00. As of that date the company's total assets were valued at $134,883,105.00. The business of the company has been managed and directed by a Board of Directors elected by the

company's shareholders, as provided in Article VI of its charter. The company's policyholders have never had a voice in either the election of the directors or officers, or in the management of the company's business. Since it commenced business in 1906 there have been approximately 500,000 holders of its insurance policies, of which some 160,000 own policies which are currently in force.

Under Article III of its charter, Columbus Mutual is authorized to write policies of insurance "on both the mutual and stock plan." The company has written policies on the "mutual plan" primarily. Mutual plan policies are "participating" policies in that the terms of such policies expressly provide that such policies are entitled to share in the profits of the company to the extent that such profits are apportioned from time to time to the respective mutual plan policies by the company's Board of Directors. "Stock plan" policies contain no such participation clause.

Article V of the Columbus Mutual charter is as follows:

> "Fifth. Dividends may be declared and paid on the outstanding stock; provided that the total dividends declared or paid shall not exceed an amount computed at the rate of ten (10) per cent per annum on the par value of the stock from the date of original issue to the date of its retirement, and; provided further that no dividend will exceed an amount equal to ten (10) per cent per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.
>
> "Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of two hundred dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. Subject, however, to the payment

of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.

"When all of said capital stock shall have been so retired and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, said company shall be reorganized, reincorporated or converted, in any manner permitted by law, into a mutual company composed of the policyholders in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock shall agree and assent to the provisions of this charter."

Each policy issued by Columbus Mutual has contained a provision to the effect that the policy constitutes the entire contract between the company and the policyholder. Each mutual plan insurance policy issued by the company has contained a provision to the effect that such policy is entitled to share in the divisible surplus of the company as apportioned or determined by the company.

Ohio State is a legal reserve stock life insurance company, organized in 1906 under the laws of Ohio. Ohio State has prospered so that as of December 31, 1957, it had insurance in force in the amount of $384,955,905.00 and total assets of $88,614,777.00. As of that date its unassigned surplus amounted to almost $5,000,000.00.

During the year 1956 Ohio State acquired 4,977, or 99.54%, of the 5,000 authorized and outstanding shares of Columbus Mutual. It acquired this stock for $6,470,100.00, being at the rate of $1,300.00 per share. It acquired this Columbus Mutual stock for the avowed purpose of merging the two companies into a single large life insurance

company of almost double the number of policyholders than was possessed by either of the companies alone, and possessed of sufficient assets and breadth of insurance coverage to insure greater protection to all policyholders, and to enable it to compete on favorable terms with other large insurance companies in the United States.

For the purposes of the merger and in order that Columbus Mutual might prospectively conduct its business in conformity with the method of business of Ohio State, the shareholders of Columbus Mutual, including Ohio State, have attempted since November, 1956, to amend Article V of the Columbus Mutual charter. The proposed amendment of Article V has been regarded by certain shareholders of Columbus Mutual as an attempt to raid the surplus of Columbus Mutual to the detriment of that company and its policyholders. Although Ohio State and other stockholders have vigorously denied this charge, they considered it advisable in the interest of public relations to abandon various proposed amendments to Article V and to finally propose the amendment which is now in issue.

The proposed amendment to Article V provides in substance that (1) the unassigned surplus as of December 31, 1956, shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company, and no dividends to any stockholders of the company shall be payable therefrom; (2) annually, for a period of twenty-five (25) years, there shall be added to this special surplus from the earnings of the company a sum equal to the net earned interest rate on the mean invested assets after all taxes based on income; (3) regular dividends shall be paid from the earnings of the company to all participating policyholders without distinction, and additional dividends may be paid out of the

special surplus for policyholders, as the directors in their sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of the amendment; (4) in the event of dissolution and liquidation at any time so long as any participating policies of the company in force on the effective date of the amendment are then in force, such policyholders shall be entitled to distribution from such special surplus, as then existed, in amounts representing their percentage interest in such surplus at the time of the effective date of the amendment; and (5) at the maturity of the last participating policy in force on the effective date of the amendment, the special surplus, as then existing, shall be permanently held for the protection of all policyholders, and no dividends may at any time be declared to shareholders, except out of surplus over the above such amount.

This proposed amendment was adopted by Columbus Mutual shareholders on October 28, 1957, and was submitted to the Secretary of State of Ohio for filing. The Attorney General of Ohio approved the amendment but advised the Secretary of State to refuse to record it because of the legal objections raised by the appellees and in order that the rights of the appellees and other policyholders could be adjudicated in the Supreme Court of Ohio.

The Secretary of State refused to record the amendment. Appellants brought an original action in mandamus in the Supreme Court of Ohio for a writ compelling the Secretary of State to file the amendment. On February 11, 1958, the Supreme Court of Ohio refused to consider the merits of the case and denied the writ on technical grounds, not necessary to be here considered. See: *State ex rel. The Columbus Mutual Life Ins. Co. v. Brown, Secy.*

of State et al., 167 O. S. 309. While the amendment was pending in the Supreme Court of Ohio appellees commenced this action in the District Court.

The judgment entered in the District Court held that the surplus of Columbus Mutual belonged to its mutual plan policyholders subject to the limited rights of the stockholders to receive dividends not to exceed 10% per annum on the par value of the stock and to receive $200.00 per share for their stock upon its retirement; that the mutual plan policyholders of Columbus Mutual would be deprived of vested property rights in the surplus if the proposed amendment was permitted; and enjoined the appellants from taking any action to make effective the proposed amendment of Article V.

As will be recognized from the foregoing recital, the issues involved in this case are what rights, if any, the mutual plan policyholders of Columbus Mutual have in the surplus of that company by reason of provisions of Article V of the company's charter, and whether or not the stockholders of Columbus Mutual, including Ohio State, have the right to amend Article V as they have attempted to do so.

Counsel for the respective parties have by oral argument and very thorough briefs ably discussed many legal principles involved in this controversy. However, it is readily admitted by them that basically the problem is not a complex one after certain legal principles, which are well established in corporate and insurance law, are recognized and accepted. We believe that a statement of these principles at this time will materially aid in presenting the real issue, which can then be disposed of.

There is a fundamental difference between a corporate insurance company with stockholder ownership, doing business as a stock company, and a mutual insurance com-

pany without capital stock, doing business on the mutual plan. In the first type of case the corporation is owned and managed by the stockholders, who need not be policyholders, the corporation is operated for the purpose of profits for the stockholders and the beneficial ownership of the profits and surplus is in the stockholders. General principles of corporate law control the rights of stockholders. The rights of policyholders are controlled by their policies of insurance and any applicable statutory provisions. In the second type of case the company is owned and managed by the policyholders and the business is conducted for the benefit of the policyholders. The beneficial ownership of the profits and surplus is in the policyholders. *Huber* v. *Martin*, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653, 664; *United States Life Ins. Co.* v. *Spinks*, 126 Ky. 405, 422, 96 S. W. 889, 894. However, it is also possible for an insurance company to be organized as a stock corporation with stockholders, which not only does business as a stock company, but also issues policies on the mutual plan. *Ohio Farmers Indemnity Co.* v. *Commissioner*, 108 F. (2) 665, 667, C. A. 6th; *Hutchins Mutual Ins. Co.* v. *Hazen*, 105 F. (2) 53, 57, C. A. D. C. It is this so-called "mixed company" which presents the problem of whether the beneficial ownership of the profits and surplus is in the stockholders or policyholders.

Although there was absence of statutory authority in Ohio to create a non-stock mutual insurance company, this did not preclude a stock insurance company, legally organized in Ohio, from issuing policies on the mutual plan. *Sections 3587, 3588, Revised Statutes* (1906). See: *Ohio ex rel. National Life Assn.* v. *Matthews*, 58 O. S. 1, 7-9; *Royal Trust Co.* v. *Equitable Life Assurance Society*, 247 F. 437, 438-439, C. A. 2nd; *Connecticut General Life Ins. Co.* v. *Eaton*, 218 F. 188, 200-201, affirmed, 233 F. 1022.

C. A. 2nd. It is immaterial whether the term "mixed company" is properly or improperly applied to them. In substance, it is a stock company which issues some of its policies on the mutual plan. *Equitable Life Assurance Society* v. *Bowers*, 87 F (2) 687, 690, C. A. 2nd. Columbus Mutual was a company of this kind, a stock company with authority under Article III of its charter to issue policies on the mutual plan. In such a company, the stockholders have certain rights as stockholders and the policyholders on the mutual plan have certain rights as policyholders.

It does not necessarily follow that since Columbus Mutual was a stock corporation, its assets, including surplus, were legally owned by its policyholders, to the exclusion of any interest therein by the policyholders on the mutual plan, with the result that the stockholders could deal with the surplus without obtaining the consent, and over the objections, of the policyholders. While this might be true as a general principle of corporate law in the absence of any contract to the contrary, it is settled law that a corporate charter is both a contract between the corporation and the state and a contract between the corporation and its stockholders. *Allen v. Scott*, 104 O. S. 436, 439; *Opdyke* v. *Security Savings & Loan Co.*, 157 O. S. 121, 132, 134. The rights which a stockholder would have in the absence of restrictive provisions in the corporate charter, can be restricted or limited by the provisions of the charter, which become part of the contract when the stock is purchased and issued to him. *Bell* v. *Union Central Life Ins. Co.*, 14 O. C. C. (N. S.) 385, affirmed without opinion, 92 O. S. 522; *Royal Trust Co.* v. *Equitable Life Assurance Society*, supra, 247 F. 437, 441, C. A. 2nd. In the present case, the provisions of Article V control the extent to which the usual rights of the stockholders have been curtailed.

We have no difficulty in determining from a reading of Article V of the corporate charter of Columbus Mutual the extent to which the usual rights of stockholders have been restricted. Although the stockholders have the right to elect directors and retain the right to operate and manage the company, their proprietary rights in the assets of the company are limited to dividends at the rate of 10% per annum on the par value of the stock, to the payment of $200.00 per share in the event of the retirement of the stock, and to have returned to them the amounts paid to the company for the stock over and above the par value of the stock subscribed. This, together with the additional provisions providing for later reorganization into a mutual company, would carry the clear implication that the stockholders have no additional interest in the earnings and surplus of the company. The language of this portion of Artiel V is unambiguous. Although it does not specifically state in whom the beneficial interest in the surplus is vested, it is a limitation on the rights of the stockholders. *Royal Trust Co.* v. *Equitable Life Assurance Society*, *supra*, 247 F. 437, 441, C. A. 2nd.

If more is needed to reach that conclusion, appellees rely upon the additional sentence in Article V reading, "Subject, however, to the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, *the surplus of the company shall belong to the holders of policies on the mutual plan*, and shall be apportioned and distributed on such equitable plan as the directors may provide." (Emphasis added.) They contend that this provision not only deprives the stockholders of any beneficial interest in the surplus, but vests such beneficial interest in the policy-

holders. The proper construction to be given to this provision in Article V is the real issue in the case.

Appellants contend that the words "Subject, however, to" mean "conditional upon" or "dependent on" or "provided that", with the result that the surplus "shall belong to the holders of policies on the mutual plan" *only when and if* the three conditions therein enumerated have been complied with. Only one of these conditions has been fulfilled, namely, the return of the paid-in surplus to shareholders. In support of this construction they rely upon the use of the future tense in the words "the surplus * * * *shall* belong." Cases are cited by appellants which hold that under certain circumstances the words are properly so construed. There are other cases cited by appellees which hold that the words mean "subservient to" or "charged with" as in the case of the conveyance of real estate subject to a mortgage. We believe that the meaning to be given to the words must be the one which carries out the intent of the parties as determined by the circumstances under which the contract was made. *Roosevelt Materials Co.* v. *Nolan Brothers, Inc.*, 264 F. (2) 807, 809, C. A. 10th; *Prudential Insurance Co. of America* v. *Nelson*, 101 F. (2) 441, 444, C. A. 6th.

Article V looked to the future reorganization of the Columbus Mutual into a mutual company. Since its organization in 1906 it has operated chiefly in writing insurance upon the mutual plan. It has described itself in its corporate name as a mutual company. Consistent with this purpose, it has materially limited the rights of its stockholders to participate in the earnings and profits. All of this clearly indicates an intent on the part of the incorporators to preserve for the policyholders on the mutual plan the profits and surplus of the company after the limited payments to the stockholders. It would be most

inconsistent to say that the stockholders were limited in their rights in the profits and surplus as hereinabove pointed out, but were nevertheless not so limited because the company had not been reorganized into a mutual company. On the other hand, it appears logical to hold that if the stockholders are not entitled to the beneficial interest in the surplus it remains in the company for the use and benefit of the policyholders on the mutual plan. The use of the words "the surplus * * * shall belong" to policyholders is not inconsistent with this construction. When the company was organized there was no surplus; the surplus referred to was to be accumulated in the future. When and as accumulated it would belong to the policyholders. The words used reflect that thought.

It is not necessary that the policyholders be parties to this contract between the corporation and its stockholders. It is the general rule both in Ohio and elsewhere that one for whose benefit a contract is made may maintain an action upon it. *Union Savings & Loan Co.* v. *Cook*, 127 O. S. 26, 33; *Rhorbacker* v. *The Citizens Building Association Co.*, 138 O. S. 273, 276; *Restatement, Contracts, Sections 135, 139.*

We construe Article V as giving to the policyholders on the mutual plan a vested contract right to the beneficial interest in the surplus, subject to the prior limited claims of the stockholders therein. *Bell* v. *Union Central Life Insurance Co.*, supra, 14 O. C. C. (N. S.) 385, affirmed without opinion, 92 O. S. 522; *Restatement, Contracts, Sec. 142.*

This ruling does not mean that the mutual plan policyholders are entitled to receive from the surplus as dividends on their policies more than is provided by the terms of the policies. As policyholders their rights are controlled by the provisions of their policies. Under their policies their rights in the surplus are limited. *Equitable*

Life Assurance Society v. *Leyoch*, 213 U. S. 25, 47; *State ex rel. Ellis* v. *Union Central Life Insurance Co.*, 43 O. C. C. (N. S.) 49, affirmed, 84 O. S. 459. But, in addition to their rights under the policies, they have certain proprietary rights in the surplus acquired by reason of the provisions of Article V. The cases relied upon by appellants which construe policyholders' rights under policy provisions are not controlling in a case where, as here, we are construing a policyholders' rights acquired through a provision of the corporate charter.

Nor does the ruling mean that the mutual plan policyholders are entitled to have the surplus divided between them at the present time, free from the control of the directors. We are here dealing with the beneficial interest in the surplus, a proprietary right, not the right of possession and distribution. Their claim is that they are entitled to have their beneficial interest in the surplus preserved in its present status for their benefit as mutual plan policyholders.

We recognize that in Ohio, as elsewhere, there is a reserved statutory power under which the charter of a corporation can be subsequently amended without violating the sanctity of the contract between the state and the corporation. *Belden* v. *The Union Central Life Ins. Co.*, 143 O. S. 329, 341; *Dodge* v. *Security Savings & Loan Co.*, supra, 157 O. S. 121. But, this does not include the right on the part of the state, acting through the stockholders of the corporation, to amend the charter retroactively in a way which will impair vested rights previously acquired under a contract between the corporation and parties other than stockholders. *Coombes* v. *Getz*, 285 U. S. 434, 441-442; *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657; *Wheatley, Trustee*, v. *The Ar-I-Root Co.*, 147 O. S. 127; *Schaffner* v. *The Standard Boiler & Plate*

Iron Co., 156 O. S. 454, 461; *Partridge v. Michigan Mutual Windstorm Ins. Co.*, 256 Mich. 76, 80.

Nor is this conclusion contrary to the provisions of Sec. 3915.05, Ohio Revised Code, which provides that the policy and the application therefor shall constitute the entire contract between the parties, or contrary to the provisions of Sec. 3911.29, Ohio Revised Code, which provides that no person shall receive from any company any special favor in the dividend or any valuable consideration or inducement not specified in the policy of insurance. Those statutory provisions relate to the rights of the parties under the contract of insurance, involving such things as the parties insured, the insurance premium, cash surrender and loan values, notice of claim and proof of loss, and facts giving rise to cancellation or forfeiture. A holder of a policy issued on the mutual plan has rights both as an insured under the policy and as a co-owner of the assets of the company. Such statutes have no application to the proprietary rights of such a policyholder in the company. *Kentucky Growers Ins. Co. v. Logan*, 149 Ky. 453, 454, 149 S. W. 922, 923; *Jaque v. Aetna Life Ins. Co.*, 123 Ky. 510, 520; *Reserve Loan Ins. Co. v. Krammer*, 83 Ind. App. 584, 146 N. E. 876; *1 Couch, Cyclopedia of Insurance Law*, (1929 Ed.) 281, Sec. 139.

The rights which the appellees have in the surplus of Columbus Mutual are protected by Article I, Sec. 10, of the United States Constitution which prohibits the impairment by a state of a contract obligation. It is not a question of degree; under the Constitution it is not to be impaired a all. *Bank of Minden v. Clement, Admx.*, 256 U. S. 126. In our opinion, the proposed amendment by the stockholders, acting under the power of corporate amendment conferred by the legislature, would be an impairment of the contract obligations of the corporation

running to the appellees. *Bell v. Union Central Life Ins. Co.*, supra, 144 O. C. (N. S.) 385, affirmed 92 O. S. 522; *Huber v. Martin*, supra, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653; *Royal Trust Co. v. Equitable Life Assurance Society*, supra, 247 F. 437, C. A. 2nd; *Schaffner v. The Standard Binder & Plate Iron Co.*, 150 O. S. 454.

The judgment is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed February 8, 1960]

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ Shackelford Miller, Jr.,
United States Circuit Judge.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SIXTH CIRCUIT DENYING REHEARING

[Filed March 23, 1960]

Appellants' petition for rehearing and appellees' response therefore, having been considered by the Court;

It is ordered, that the petition for rehearing be denied.

Approved for entry:

s/ Shackelford Miller, Jr.,
United States Circuit Judge.

ARTICLES OF INCORPORATION OF THE COLUMBUS MUTUAL LIFE INSURANCE COMPANY

These Articles of Incorporation of The Columbus Mutual Life Insurance Company.

Witnesseth, that we, the undersigned, hereby agree and declare our intention to form a corporation under the laws of the State of Ohio for the purpose hereinafter set forth, and we hereby adopt as the charter for said corporation the regulations and provisions following, as provided in Chapter 10, Division II, Title II, Part Second, of the Revised Statutes of Ohio, to-wit:

Charter.

First. The name of said corporation shall be The Columbus Mutual Life Insurance Company.

Second. Said corporation is to be located at the City of Columbus, in Franklin County, Ohio.

Third. Said corporation is formed for the purpose of making insurance on the lives of individuals, and every insurance appertaining thereto and connected therewith, making insurance against accidents to persons and sickness and temporary and permanent physical disability, and granting, purchasing, and disposing of annuities, on both the mutual and stock plan, and for all purposes incidental or necessary thereto.

Fourth. The capital stock of said corporation shall be one hundred thousand dollars ($100,000.00), divided into one thousand (1000) shares of the par value of one hundred dollars ($100.00) each, which shall be subscribed for, accepted and taken, and shall be fully paid, before commencing business.

Fifth. Dividends may be declared and paid on the outstanding stock; provided that the total dividends declared or paid shall not exceed an amount computed at the rate

of ten (10) per cent per annum on the par value of the stock from the date of original issue to the date of its retirement, and, provided further that no dividend will exceed an amount equal to ten (10) per cent per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.

Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of two hundred dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. Subject, however, to the payment of dividends, the retirement of stock, and the return to the holders of stock the amounts which have been paid to the company over and above the par value of the stock subscribed, the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.

When all of said capital stock shall have been so retired and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, said company shall be reorganized, reincorporated or converted, in any manner permitted by law, into a mutual company composed of the policyholders in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock shall agree and assent to the provisions of this charter.

Sixth. The corporate powers and business of the company shall be exercised, conducted and controlled, and the property managed by a board of directors, consisting of not less than twelve nor more than the number at any time authorized by law and as may from time to time be fixed by the by-laws of the company. At the first election of directors one-third of the directors shall be elected to serve until the next annual meeting, one-third shall be elected to serve until the second annual meeting, and one-third shall be elected to serve until the third annual meeting, and thereafter one-third of such directors shall be elected at such annual meeting to serve for three years and until their successors shall be elected and qualified. Vacancies in the board of directors, from any cause, shall be filled by directors.

The board of directors shall elect from among their number a president and one or more vice-presidents, and shall also elect a secretary and a treasurer, and may appoint such other officers and agents as may from time to time be provided in the by-laws of the company, or as may be deemed proper by the directors, all of which officers and agents shall at all times be subject to the direction and control of the board of directors and shall be subject to removal by the directors at any time.

A majority of the board of directors and other officers of the company by a majority of the stockholders present, except that in case of a vacancy the same shall be filled as provided above for such cases; and the officers of the company shall be elected by the board of directors at their first meeting after their election in each year, except that in case of a vacancy in any office, the same shall be filled in the manner as is provided for filling a vacancy in the office of director.

Reports showing the business and condition of the company shall be made by the directors to the stockholders at the annual meetings.

Seventh. The annual meeting of the company shall be held at the office of the company in the city of Columbus, Ohio, at such time as may be fixed in the by-laws of the company. Reasonable notice of all meetings of stockholders shall be given, by mail or publication, or as may from time to time prescribed by the directors.

time to time be prescribed by the directors.

In witness whereof, we hereunto set our hands, this seventh day of November A. D. 1906.

John M. Sheets,
Stephen A. Court,
John R. Hurst,
C. W. Brandon,
W. B. Carpenter,
F. A. Reeder,
Chas. M. Peters,
J. E. Beery,
D. H. Thomas,
H. C. Crum,
C. F. Luthy,
Albert G. Joyce,
S. C. Priest,
Emil Kiesewetter,
Geo. A. Peters.

Department of Attorney General

Columbus, Ohio, November 8, 1906

I hereby certify that I have examined the articles of incorporation of the Columbus Mutual Life Insurance Company to be located at the city of Columbus, Franklin county, Ohio, and that the same are in accordance with the provisions of Chapter X, Title II, Division II, Part Second.

of the Revised Statutes of Ohio, and that the same are not inconsistent with the constitution and laws of the United States and of this state.

Wade H. Ellis,
Attorney General.

Certificate of Increase of Capital Stock

C. W. Brandon, President, and Geo. M. Peters, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises, and acting on behalf of said company, do hereby certify that the twelfth day of February, A.D. 1910, the capital stock of said company having theretofore been fully subscribed and paid up, by a vote of the holders of the majority of the capital stock of said company, at a meeting called by a majority of its directors, and held at the office of the company in the Wyandotte Building, in the City of Columbus, Franklin County, Ohio, and at which meeting the holders of 667 shares of the capital stock of said company were present in person or by proxy pursuant to notice therefor by letter to each of the stockholders and by publication as requested by Section 3262 of the Revised Statutes of Ohio, it was on motion "Resolved, that the capital stock of The Columbus Mutual Life Insurance Company, be increased from one hundred thousand dollars, ($100,000.00) its present capital stock to one hundred and twenty-five thousand dollars ($125,000.00) divided into twelve hundred and fifty (1250) shares of one hundred dollars ($100.00) each, and that such additional stock be issued and disposed of, at such times, and at such prices, as shall be determined by the executive committee; and that the president and secretary be, and they hereby are, instructed to file a certificate of such increase with the Secretary of State," which is done accordingly.

In witness whereof, the aforesaid C. W. Brandon, President and Geo. A. Peters, Secretary of The Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have hereunto set their hands, this twenty-first day of February, A.D. 1910.

The Columbus Mutual Life Insurance Company,

By C. W. Brandon,
President.

Geo. A. Peters,
Secretary.

[Seal]

Certificate of Increase of Capital Stock

C. W. Brandon, President and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises, and acting on behalf of said company, do hereby certify that on the tenth day of August, 1912, by a vote of the holders of the majority of the capital stock of said company at a meeting called by a majority of the directors for that purpose and held at the office of the company, in the City of Columbus and County of Franklin, Ohio, and at which meeting the holders of a majority of the capital stock of said company were present in person or by proxy, thirty days' notice of the time, place and object of which meeting having been given by publication in the Ohio State Journal, a newspaper of general circulation and by letter addressed to each stockholder of said company at his usual place of residence, as required by law, agreed in writing to the increase of the capital stock hereinafter set forth, and it was on motion resolved that the capital stock of The Columbus Mutual Life Insurance Company be increased from $125,000.00, its present capital stock, to $150,000.00, divided into 1500 shares of $100.00 each. And it was further resolved that the presi-

and secretary of said company be instructed to file a certificate of such increase with the Secretary of State, which is hereby accordingly done.

In witness whereof, the aforesaid C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have hereunto set their hands this fifteenth day of July, A.D. 1913.

The Columbus Mutual Life Insurance Company,
By C. W. Brandon,
President.
D. E. Ball,
Secretary.

[Seal]

Certificate of Increase of Capital Stock.

(Common)

C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises and acting for and on behalf of the company, do hereby certify, that on the tenth day of August, 1912, the authorized capital stock of said company having been fully subscribed for and fully paid up, on said day, by a vote of the stockholders of the majority of all the stock of said company, at a stockholders' meeting called for that purpose, by a majority of the board of directors, held at the office of the company in the City of Columbus, Franklin County, Ohio, due notice of which meeting was given according to law, it was, on motion resolved that the capital stock of said company be increased as hereinafter set forth, and it was further resolved that a certificate of such increase should be filed with the Secretary of State, and said stock sold at such time as the board of directors of said company should de-

termine, and that pursuant to said authority by a unanimous vote of the board of directors held at the office of the company in the City of Columbus, Ohio, on the thirteenth day of July, 1920, it was resolved that the president and secretary be authorized and directed to file a certificate of said increase of the capital stock of said company, from one hundred and fifty thousand ($150,000) dollars, its present capital stock, to two hundred thousand ($200,000) dollars, the increase to be divided into five hundred shares of one hundred ($100.00) dollars each.

In witness whereof, the aforesaid C. W. Brandon, President, and D. E. Ball, Secretary of The Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have hereunto set their hands this third day of September, 1920.

The Columbus Mutual Life Insurance Company,

By C. W. Brandon,
President.

D. E. Ball,
Secretary.

[Seal].

Certificate of Increase of Capital Stock

(Common)

C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises and acting for and on behalf of the company, do hereby certify, that on the seventeenth of January, 1921, the authorized capital stock of said company having been fully subscribed for and fully paid up, at the annual meeting of the board of directors, on said day at the office of the company, the following resolution was unanimously adopted:

Whereas, in the opinion of the board of directors, the company requires a larger amount of capital stock than its present capital of $200,000.00.

And whereas, authority for so doing has been conferred by resolution of the stockholders, more than two-thirds of the holders of said capital stock concurring therein.

Now, therefore, be it resolved, that the capital stock of the company be increased from $200,000.00 par value to $250,000.00 par value, and that a certificate of such increase be filed by the president and secretary, with the Secretary of State of Ohio, as provided by law.

Said increase of stock to be divided into 500 shares, of $100.00 each.

In witness whereof, the aforesaid C. W. Brandon, President, and D. E. Ball, Secretary of The Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have hereunto subscribed their names and have caused the seal of the company to be hereunto affixed this twenty-fourth day of May, 1921.

The Columbus Mutual Life Insurance Company,

By C. W. Brandon,
President.

D. E. Ball,
Secretary.

[Seal]

Certificate of Increase of Capital Stock

(Common)

C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises and acting for and on behalf of the company, do hereby certify that on to-wit, January 16, 1922, by a unanimous vote of the board of directors, held at the office of the company in the city of Columbus, Ohio,

on the said date, having been authorized so to do by the stockholders of the company owning more than two-thirds of the capital stock herein, as provided in Section 9345 G. C. of Ohio, it was resolved that the capital stock of the company be increased from two hundred fifty thousand ($250,000) dollars to three hundred thousand ($300,000) dollars, and that the president and secretary be authorized and directed to file a certificate of such increase of the capital stock of the company from two hundred fifty thousand ($250,000) dollars its present capital stock to three hundred thousand ($300,000) dollars, the increase to be divided into 500 shares of $100.00 each.

In witness whereof, the said C. W. Brandon, president, and D. E. Ball, secretary of the Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have subscribed their names and affixed the seal of the company hereto this eighteen day of January, 1922.

The Columbus Mutual Life Insurance Company,

By C. W. Brandon,
President.

By D. E. Ball,
Secretary.

[Seal]

Certificate of Increase of Capital Stock

(Common)

C. W. Brandon, President, and D. E. Ball, Secretary, of The Columbus Mutual Life Insurance Company, duly authorized in the premises and acting for and on behalf of the company, do hereby certify that on to-wit, January 16, 1922, by a unanimous vote of the board of directors, held at the office of the company in the city of Columbus, Ohio, on the said date, having been authorized so to do by the stockholders of the company owning more than two thirds

of the capital stock therein, as provided in Section 9345 G. C. of Ohio, it was resolved that the capital stock of the company be increased from three hundred thousand ($300,000) dollars to five hundred thousand ($500,000) dollars, and that the president and secretary be authorized and directed to file a certificate of such increase of the capital stock of the company from three hundred thousand ($300,000) dollars its present capital stock to five hundred thousand ($500,000) dollars, the increase to be divided into 2000 shares of $100.00 each.

In witness whereof, the said C. W. Brandon, president, and D. E. Ball, secretary, of the Columbus Mutual Life Insurance Company, acting for and on behalf of said company, have subscribed their names and affixed the seal of company hereto this ..... day of April, 1922.

By C. W. Brandon,
President.

By D. E. Ball,
Secretary.

[Seal]

United States of America, State of Ohio, Office of the Secretary of State.

I, Ted W. Brown, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the These Articles of Incorporation of The Columbus Mutual Life Insurance Company, location Columbus, Ohio, filed on the seventeenth day of November, 1906, recorded in Vol. 120, page 458.

Certificate of Increase, filed on the twenty-third day of February, 1910, recorded in Vol. 121, page 679.

Certificate of Increase, filed on the fifteenth day of July, 1913, recorded in Vol. 174, page 23.

Certificate of Increase, filed on the seventh day of September, 1920, recorded in Vol. 250, page 204.

Certificate of Increase, filed on the eighth day of July, 1921, recorded in Vol. 269, page 346.

Certificate of Increase, filed on the twentieth day of January, 1922, recorded in Vol. 275, page 522.

and

Certificate of Increase of The Columbus Mutual Life Insurance Company, filed on the sixth day of April, 1922, recorded in Vol. 279, page 566, of the Records of Incorporations.

Witness my hand and official seal at Columbus, Ohio, this twenty-fourth day of October, A. D. 1957.

Ted W. Brown,
Secretary of State.

[Seal]

Certificate of Amendment of October 28, 1957 to Articles of The Columbus Mutual Life Insurance Company

Frank L. Barnes, First Vice President, and Orval J. Miller, Secretary of The Columbus Mutual Life Insurance Company, an Ohio corporation, with its principal office located at 303 East Broad Street, Columbus, Ohio, do hereby certify that a meeting of the holders of the shares of said corporation entitling them to vote on the proposal to amend the articles of incorporation thereof, as contained in the following resolution, was duly called and held on the twenty-eighth days of October, 1957, at which meeting a quorum of such shareholders (and each class thereof) was present in person or by proxy, and that by the affirmative vote of the holders of shares entitling them to exercise 99.54% of the voting power of the corporation on such proposal the following resolution was adopted to amend the articles:

Whereas, The Ohio State Life Insurance Company, a legal reserve life insurance company, organized under the laws of Ohio, has acquired 4,977 out of 5,000, or 99.54%, of the shares of The Columbus Mutual Life Insurance Company, both companies being stock companies writing policies primarily on the participating or mutual plan, and

Whereas, The National Association of Insurance Commissioners, an association which determines the valuation at which life insurance companies may carry their investment in securities on their books, has determined that the stock of The Columbus Mutual Life Insurance Company may be carried on the books of The Ohio State Life Insurance Company, at three hundred thirty-three dollars ($333.00) per share so long as the provisions of Article V of the Articles of Incorporation of The Columbus Mutual Life Insurance Company remain in effect, and

Whereas, the book value of the shares of stock of this company, as customarily computed for stock life insurance companies and allowed by such association, is far in excess of three hundred thirty-three dollars ($333.00), and

Whereas, it is being considered that the two companies may in the future merge, which would require that earnings of this company be handled in conformity with the methods employed by The Ohio State Life Insurance Company, while fully protecting its present participating policyholders, now therefore,

Be it resolved, that the Fifth Article of the Articles of Incorporation of The Columbus Mutual Life Insurance Company (as amended) be and the same is hereby amended to read as follows:

Fifth. Unassigned surplus as of December 31, 1956, as shown on the annual statement filed with the Superintendent of Insurance of Ohio, to-wit: $10,739,205.07, shall be held and used as a special surplus for policyholders for pro-

tection of the holders of participating policies of the company which are in force on the effective date of this amendment, and no dividends to any stockholders of the company shall be payable therefrom.

Annually, for a period of twenty-five (25) years after the effective date of this amendment, there shall be added to said special surplus for policyholders, as then existing, from the earnings of the company a percentage of such then existing special surplus for policyholders equal to the net earned interest rate on the mean invested assets after all taxes based on income.

Regular dividends shall be paid from the earnings of the company to all participating policyholders of the company without distinction. Additional dividends may be paid out of such special surplus for policyholders, as the directors in their sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of this amendment.

In the event of dissolution and liquidation of the company at any time so long as any participating policies of the company in force on the effective date of this amendment are then in force, such policyholders shall be entitled to distribution from such special surplus for policyholders, as then existing, in amounts representing their percentage interest in such surplus at the time of the effective date of this amendment.

At the maturity of the last participating policy of the company in force on the effective date of this amendment the special surplus for policyholders, as then existing, shall be permanently held for the protection of all policyholders, and no dividends may at any time be declared to stockholders, except out of surplus over and above such amount.

In witness whereof, said Frank L. Barnes, First Vice President, and Orval J. Miller, Secretary, of The Columbus

Mutual Life Insurance Company, acting for and on behalf of said corporation, have hereunto subscribed their names and caused the seal of said corporation to be hereunto affixed this twenty-eighth day of October, 1957.

By Frank L. Barnes,
First Vice President,
By Orval J. Miller,
Secretary.

Approved: (See letter of transmittal and certification attached) October 29, 1957
Wm. Saxbe,
Attorney General of Ohio.

Office of the Attorney General
State of Ohio
Columbus 15

October 29, 1957.

Hon. Ted W. Brown
Secretary of State
State House
Columbus 15, Ohio

Dear Sir:

You have submitted to me amendment to Articles of Incorporation of Columbus Mutual Life Insurance Co., dated October 28, 1957, for certification in accordance with Section 3907.03, Revised Code. After careful consideration I return said amendment to you with my approval endorsed thereon, with however to the following observation:

This company was incorporated under Ohio law in 1906, as a legal reserve stock life insurance company. The company in my opinion has a present legal right to amend its Articles of Incorporation being as it is a stock company,

provided always that such amendment is not inconsistent with the constitution and laws of the United States and of this state.

It is contended on behalf of some of the participating policyholders of this company that the amendment which you have submitted may not be recorded by you on the ground that it will deprive such policyholders of constitutional rights which they may have under the present charter of the company.

Any decision reached by this office upon the complex questions raised by this amendment will not finally adjudicate the matter. It is recognized that the rights of some one hundred and fifty thousand policyholders are involved, which rights must and should in my judgment be finally determined by the Supreme Court.

In view of these facts and in order that the rights of all parties affected may be finally upon the amendment and hereby certify the same as provided by such Section 3907.03, with, however, the advice to you that, as Secretary of State, you refuse to record such amendment and certificate.

This course of procedure should enable the company to invoke the original jurisdiction of the Supreme Court, thus avoiding uncertainty and delay in the final determination of this matter. It is my opinion that facilitating and expediting this matter will best serve interests of the thousands of policyholders of this company, the shareholders, and the general public.

Very truly yours,

Wm. Saxbe,
Attorney General.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 10, United States Constitution

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article XIII, Section 2, Constitution of the State of Ohio

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed: Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.

Section 1701.69, Revised Code of Ohio

(A) Except in the case of an amendment to the articles to change a corporation into a non-profit corporation, the articles may be amended from time to time in any respect if the articles as amended set forth all such provisions as are required in, and only such provisions as may properly be in, original articles filed at the time of adopting the amendment, and, if a change in issued shares is to be made, or if as the result of any amendment the stated capital of any class of shares is to be increased or reduced, then such provisions as are necessary to effect such change, or to effect such increase or reduction of stated capital.

(B) Without limiting the generality of such authority, the articles may be amended to:

(1) Change the name of the corporation;

(2) Change the place in this state where its principal office is to be located;

(3) Change, enlarge, or diminish its purpose or purposes;

(4) Increase or decrease the authorized number of shares of any class;

(5) Authorize shares of a new class or classes;

(6) Increase or decrease the par value of issued or unissued shares with par value;

(7) Change issued or unissued shares of any class, whether with or without par value, into the same or a different number of shares of any class with or without par value, theretofore or then authorized;

(8) Provide that, as a result of an amendment described in paragraph (6), (7), or (10) of division (B) of this section, the stated capital of any class of shares shall be increased or reduced consistent with the provisions of section 1701.30 of the Revised Code, except that in the case of an amendment to change the corporation into a non-profit corporation the stated capital of the corporation may be reduced to an amount less than five hundred dollars;

(9) Change any of the express terms of issued or unissued shares of any class or series, which change may include the discharge, adjustment, or elimination of rights to accrued undeclared cumulative dividends on the shares of such class or series;

(10) Change a corporation into a non-profit corporation;

(11) Change any provision of the articles or add any provision that may properly be included therein.

Section 1701.71, Revised Code of Ohio

(A) The shareholders at a meeting held for such purpose may adopt an amendment, including any that could be adopted by the directors, by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on such proposal or, if the articles provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of such voting power, and by such affirmative vote of the holders of shares of any particular class as is required by the articles. In addition, whenever under division (B) of this section the holders of shares of any particular class are entitled to vote as a class on the adoption of an amendment, such amendment in order to be adopted must receive the affirmative vote of the holders of at least two-thirds or, if the articles provide or permit, a greater or lesser proportion, but not less than a majority, of the shares of such class. If the proposed amendment would authorize any particular corporate action which, under any applicable provision of law or under the existing articles, could be authorized only by or pursuant to a specified vote of shareholders, such amendment in order to be adopted must receive the affirmative vote so specified.

(B) Regardless of limitations or restrictions in the articles on the voting rights of the shares of any class, the holders of shares of a particular class, and in the cases specified in paragraphs (6), (7), and (8) of this division the holders of shares of every class, shall be entitled to vote as a class on the adoption of an amendment which:

(1) Increases or decreases the par value of the issued shares of the particular class;

(2) Changes issued shares of the particular class, whether with or without par value, into a lesser number of shares of the same class or into the same or a different

number of shares of any other class, with or without par value, theretofore or then authorized;

(3) Changes the express terms, or adds express terms, of the shares of the particular class in any manner substantially prejudicial to the holders thereof;

(4) Changes the express terms of issued shares of any class senior to the particular class in any manner substantially prejudicial to the holders of shares of the particular class;

(5) Authorizes shares of another class which are convertible into, or authorizes the conversion of shares of another class into, shares of the particular class, or authorizes the directors to fix or alter conversion rights of shares of another class which are convertible into shares of the particular class;

(6) Provides, in the case of an amendment described in paragraph (1) or (2) of division (B) of this section, that the stated capital of the corporation shall be reduced as a result of the amendment, or provides, in the case of an amendment described in paragraph (5) of division (B) of this section, that the stated capital of the corporation shall be reduced upon the exercise of such conversion rights;

(7) Changes substantially the purposes of the corporation, or provides that thereafter an amendment to the articles may be adopted which changes substantially the purposes of the corporation;

(8) Changes a corporation into a non-profit corporation.

(C) An amendment which changes a corporation into a non-profit corporation shall contain a statement of purposes proper in the case of a non-profit corporation, and a statement that after the effective date of the amendment the corporation shall be subject to the provisions of the Revised Code relating to non-profit corporations. In the case of a corporation formed on or after June 9, 1927, the amendment

shall also provide for the cancellation of all outstanding shares and the terms and considerations, if any, for such cancellation. In the case of a corporation formed prior to June 9, 1927, the amendment may provide for such cancellation of outstanding shares, but if it does not so provide, the amendment shall contain a provision forbidding the payment of dividends on any shares after the effective date of the amendment.

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No. 918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE OHIO STATE LIFE INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

RAY A. CLARK, ET AL.,

Respondents.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

FOREWORD

The Ohio State Life Insurance Company, one of the petitioners, will sometimes hereinafter be referred to as "Ohio State" or "Ohio State Life", and The Columbus Mutual Life Insurance Company will sometimes hereinafter be referred to as "Columbus Mutual".

The Petition for a Writ of Certiorari is referred to as the "Petition".

The Appendix to that Petition is referred to as "Petitioners' Appendix".

The Appendix to this brief is referred to as "Respondents' Appendix".

OPINIONS BELOW

The section entitled "Opinions Below" in the Petition is in proper form.

JURISDICTION

We agree with the Petitioners' jurisdictional statement.

QUESTIONS PRESENTED

We maintain that Petitioners' statement of the questions presented (Petition, pp. 2-3) is misleading because it presupposes a purely prospective charter amendment whereas the proposed amendment actually before the Court has been held retroactive by both lower courts.

The following are the questions presented to the Court of Appeals, as set forth in the opinion of that Court (Petitioners' Appendix, p. 37).

"What rights, if any, the mutual plan policyholders of Columbus Mutual have in the surplus of that company by reason of provisions of Article V of the company's charter, and whether or not the stockholders of Columbus Mutual, including Ohio State, have the right to amend Article V as they have attempted to do so."

To these questions, the Court of Appeals gave the following answers:

1. "We construe Article V as giving to the policyholders on the mutual plan a vested contract right to the beneficial interest in the surplus, subject to the prior limited claims, of the stockholders therein". (Petitioners' Appendix, p. 42).

2. "In our opinion, the proposed amendment by the stockholders, acting under the power of corporate amendment conferred by the legislature, would be an impairment of the contract obligations of the corporation running to the appellees". (Petitioners' Appendix, pp. 44-45).

In this Court, the petitioners concede the correctness of the decision of the Court of Appeals in that they say that they do not "ask this Court to review the decision of the lower court in holding that these policyholders have a vested third party contract interest in the entire surplus of Columbus Mutual", which petitioners assert amounts to some nineteen million dollars. (Petition, p. 23). Also, petitioners say that they do not seek a review "of the lower court's determination that respondents, and the other mutual plan policyholders of Columbus Mutual, possess a vested beneficial interest in the company's existing surplus and profits, including its voluntary reserves, by virtue of Article V of the company's charter". (Petition, p. 11).

Petitioners also concede that the reserved power to amend corporate charters (Article XIII, Section 2, Ohio Constitution) "cannot be exercised to impair or destroy rights of contract which vested prior to the exercise of the power". (Petition, p. 15).

Thus, the immediate questions presented to the Court are:

1. Whether the proposed amendment would be an impairment of the contract obligations of the corporation running to the Respondents? (Petitioners' Appendix, pp. 44-45).

2. Whether the Respondents would be deprived of vested property rights in the surplus without notice, acquiescence and due process of law, if the proposed amendment were permitted? (Petitioners' Appendix, p. 30).

These immediate questions lead directly to the ultimate question which is whether the stockholders of Columbus Mutual have the right to amend Article V of the charter as they have attempted to do.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process provisions of the Constitution of the United States, contained in Section 1, Article XIV, Amendments, and of the Constitution of the State of Ohio, contained in Section 16, Article I, are set forth below for the convenience of the Court.

Constitution of the United States, Section 1, Article XIV, Amendments (in part):

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Constitution of the State of Ohio, Section 16 Article I (in part):

> "All courts shall be open, and every person, for an injury done him in his land, goods, persons or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. * * *."

SUPPLEMENTAL STATEMENT OF MATTER INVOLVED

The undisputed facts (Opinion of the Court of Appeals, Petitioners' Appendix, p. 32) include several important aspects of the matter involved not recited in Petitioners' Summary Statement. Hence, we set them forth.

During the year 1956 the Ohio State Life Insurance Company, one of the petitioners, purchased 4,977 of the 5000 issued and outstanding shares of the common stock of the Columbus Mutual Life Insurance Company, constituting 99.54% of that stock. (Respondents' Appendix, pp. 3a and 35a). Although that stock had a par value of $100.00 per share and a redemption value of $200.00 per share, the price paid by Ohio State was $1300.00 per share. (Respondents' Appendix, pp. 5a, 6a and 35a, 36a). At

the time of that purchase, it was the admitted plan and program of Ohio State, its stockholders and directors, to merge Columbus Mutual into Ohio State and thereby add the net worth of Columbus Mutual to the net worth of Ohio State, a result of which would have been to increase the value of Ohio State's stock by approximately $20,000,000.00 (Respondents' Appendix, pp. 7a and 36a) at the expense of Columbus Mutual's policyholders.

Ohio State placed five of its directors and seven of its stockholders on Columbus Mutual's twelve-man board of directors, and the president and first vice-president of Ohio State assumed the same offices in Columbus Mutual. (Respondents' Appendix, pp. 3a, 4a and 35a).

Although Ohio State had paid $6,470,100.00 for the Columbus Mutual stock (at $1300.00 per share) a subsequent ruling of the National Association of Insurance Commissioners required Ohio State to value that stock upon its books at only $333.00 per share, the effect of which was to reduce Ohio State's surplus by $4,805,990.00. (Respondents' Appendix, pp. 7a, 12a, and 36a; Petitioners' Appendix, p. 58). This required valuation of the Columbus Mutual stock was directed to be maintained as long as the provisions of Article V remained in effect. (Respondents' Appendix, pp. 7a and 36a; Petitioners' Appendix, p. 58).

Recognizing the binding effect of that stock valuation, and for the purpose of carrying out their avowed intention to merge these companies, and in order that Columbus Mutual might prospectively conduct its business in conformity with the method of business of Ohio State, as a pure stock company (Respondents' Appendix, pp. 24a, 39a; Petitioners' Appendix, pp. 35, 58), the petitioners have attempted since November, 1956, to amend Article V of the Columbus Mutual charter. (Petitioners' Appendix, p. 35). They admit that they intend to and will continue

their efforts to eliminate the restrictions and limitations contained in Article V, intend to and will continue their efforts to merge Columbus Mutual into Ohio State, and intend to and will continue their plan and program to deprive Columbus Mutual's policyholders of its surplus. (Respondents' Appendix, pp. 17a and 36a).

At all times in the District Court the petitioners insisted that the surplus of Columbus Mutual was owned exclusively by the stockholders—that is, to the extent of 99.54% by Ohio State—and that the policyholders had no beneficial interest therein. (Respondents' Appendix, pp. 35a, 36a, 37a, 38a, 39a, 40a, 41a, 44a, 45a). They took the same position in the Court of Appeals. (Petitioners' Appendix, p. 41; Appellants' Brief in the Court of Appeals, pp. 12, 50; 59-60). Both lower courts held otherwise.

Because all questions in this case arise out of Article V of Columbus Mutual's articles of incorporation, the same is set forth here for the convenience of the Court (see also Petitioners' Appendix, pp. 46-47).

ARTICLE V OF COLUMBUS MUTUAL'S CHARTER

"Dividends may be declared and paid on the outstanding stock; provided that the total dividends declared or paid shall not exceed an amount computed at the rate of ten (10) per cent. per annum on the par value of the stock from the date of original issue to the date of its retirement, and, provided further that no dividend will exceed an amount equal to ten (10) per cent. per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.

"Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of two hundred dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. (Paid-in surplus was repaid in 1922). **Subject, however, to** the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, **the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.**

"**When** all of said capital stock **shall have been so retired** and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, **said company shall be reorganized, reincorporated or converted,** in any manner permitted by law, **into a mutual com-**

pany composed of the policyholders in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock **shall agree and assent to the provisions of this charter".** (Emphasis and parenthetical statement added)

ARGUMENT

A. What the Proposed Amendment Would do

In the District Court the amended complaint alleged, and the answer admitted (Respondents' Appendix, pp. 22a-23a, and 40a) that Columbus Mutual has issued all of its life insurance policies on the level or fixed premium plan, and that under this plan the maximum annual contribution which any policyholder can be called upon to pay is uniform or fixed throughout the life of his policy. It is alleged and admitted that in the calculation of its premium rates, Columbus Mutual has adopted one or more tables of mortality, showing the probable death rate for each age of life; it has adopted an assumed rate of interest which it might expect to realize upon its invested assets during the lifetime of each policy; it has computed premiums based thereon and has added thereto sums, known in the life insurance industry as "loading", for the purpose of conducting its business as well as any unforeseen contingencies such as an abnormal death rate due to war or pestilence. It is admitted that Columbus Mutual's premium rates, so calculated, have been in excess of said company's requirements, and will continue so to be in the future on the basis of the experience of life insurance companies generally; also that in Columbus Mutual's experience, the actual death rate has been substantially lower than the expectancy shown in the mortality tables which were assumed in calculating its premiums, and the interest rate which it has realized upon its investments has proved higher than the assumed rate. It is conceded that the "loading" has been greater than that required to cover the expense of conducting the business and to meet contingencies, and that after making due provision for a fair

and adequate margin of safety each year, the excess has been added to Columbus Mutual's surplus. It is alleged and admitted that said excess will continue to accumulate and constitutes and will continue to constitute Columbus Mutual's surplus.

The proposed amendment of Article V (Petitioners' Appendix, pp. 58-59) shows on its face that if it were to be made effective, the following results, among others, would ensue:

1. The proposed amendment would eliminate from Columbus Mutual's articles the provision that, subject to the payment of restricted dividends, the retirement of the stock at the price of $200.00 per share (double its par value), and the repayment of paid-in surplus (which was repaid in 1922), the surplus of Columbus Mutual *shall belong to* the holders of policies on the mutual plan and *shall be apportioned and distributed* on such equitable plan as the directors may determine. In place of that provision, the proposed amendment would substitute a statement that Columbus Mutual's "unassigned surplus as of December 31, 1956", to-wit: $10,739,205.07 (which is only part of relator's true surplus as of now) "shall be *held* and *used* as a special surplus for policyholders *for protection of* the holders of participating policies of the Company which are in force and effect on the effective date of this amendment".

2. Petitioners further propose that annually, for a period of 25 years, there "be added to said special surplus for policyholders, as then existing from the earnings of the Company, a percentage of such then existing special surplus equal to the net earned interest rate on the mean invested assets after all taxes based on income" (Petitioners' Appendix, p. 59). Just what would be added to the "special surplus" is not clear, but what is very plain is that a sub-

stantial part of the present surplus plus a large portion of future earnings on present business would be freed from all restrictions and released for the stockholders to use as they please.

3. The proposed amendment would eliminate from the charter the restriction of dividends to its stockholders to 10% per annum on the par value of their stock. In substitution therefor would be a statement that no dividends to any stockholders shall be paid out of said "special surplus for policyholders". Dividends in *unlimited* amounts could be paid from any other surplus funds.

4. The proposed amendment would eliminate from the charter the limitation of $200.00 per share that may be paid to the stockholders for their stock upon its retirement.

5. The proposed amenment would eliminate from the Columbus Mutual charter the *requirement* that its *surplus* (in excess of the amounts necessary to pay the restricted dividends to stockholders and retire their stock at $200.00 per share) shall be *apportioned and distributed* on such equitable plan as the directors may provide. In substitution therefor would be a statement *permitting* the directors, *in their sole discretion*, to pay dividends out of said "special surplus for policyholders" to "holders of participating policies of the Company in force on the effective date of this amendment".

6. The proposed amendment would eliminate from the charter the *requirement* that when its capital stock shall have been retired, *the company must be mutualized*—that is, converted into a mutual company composed of its policyholders. (Under existing law, such mutualization would be accomplished pursuant to Section 3913.01 to 3913.10, inclusive, Revised Code of Ohio).

7. The proposed amendment would eliminate from the charter that which is now inherent in it, to-wit: that upon dissolution *or* liquidation of Columbus Mutual all of its surplus (in excess of the amounts necessary to pay the restricted dividends to stockholders and retire their stock at $200.00 per share) would not only belong to but *would be distributed to all* of its *then* policyholders on the mutual plan. In substitution therefor would be a provision that in the event of *both* the dissolution *and* liquidation of Columbus Mutual, those of the present policyholders whose policies were *then* in force would receive *only* "amounts representing their percentage interest in said "special surplus for policyholders" "at the time of the effective date of this amendment". (Petitioners' Appendix, p. 59).

In commenting on the effect of the proposed amendment, the opinion of the Court of Appeals says (Petitioners' Appendix, pp. 44-45):

"The rights which the appellees have in the surplus of Columbus Mutual are protected by Article I, Sec. 10, of the United States Constitution which prohibits the impairment by a state of a contract obligation. It is not a question of degree; under the Constitution it is not to be impaired at all. *Bank of Minden v. Clement, Admx.*, 256 U.S. 126. In our opinion, the proposed amendment by the stockholders, acting under the power of corporate amendment conferred by the legislature, would be an impairment of the contract obligations of the corporation running to the appellees. *Bell v. Union Central Life Ins. Co.*, supra, 14 O.C.C. (N.S.) 385, affirmed 92 O.S. 522; *Huber v. Martin*, supra, 127 Wis. 412, 105 N.W. 1031, 3 L.R.A. (N.S.) 653; *Royal Trust Co. v. Equitable Life Assurance Society*, supra, 247 F.437, C.A. 2nd; *Schaffner v. The Standard Boiler & Plate Iron Co.*, 150 O. S. 454.

B. Article V Limits the Rights of the Stockholders

In this insurance company, as the Court of Appeals held (Petitioners' Appendix, p. 40), the proprietary rights of the stockholders in the assets of the company "are limited to dividends at the rate of 10% per annum on the par value of the stock, to the payment of $200.00 per share in the event of the retirement of the stock, and to have returned to them the amounts paid to the company for stock over and above the par value of the stock subscribed." (The paid-in surplus was repaid to the stockholders in the year 1922. Respondents' Appendix, pp. 21a and 40a). Beyond those rights, the stockholders "have no additional interest in the earnings and surplus of the company." (Petitioners' Appendix, p. 40). And the provisions of Article V "control the extent to which the usual rights of the stockholders have been curtailed" in Columbus Mutual. (Petitioners' Appendix, p. 39).

The limitation on the rights of Columbus Mutual's stockholders arises out of the contract created by Article V of the charter. So the Court of Appeals held. (Petitioners' Appendix, p. 39). And its decision is fully sustained by prior decisions of the Ohio courts and of this Court. See *Geiger v. American Seeding Machine Co.*, (1931) 124 Ohio St. 222, 237, 177 N.E. 594, 79 A.L.R. 614; *Curran v. Arkansas*, 56 U.S. 304, 15 How. 304, 14 L.Ed. 705; *Woodruff v. Trapnall*, 51 U.S. 190, 10 How. 190, 13 L.Ed. 383; *Hathorn v. Calef*, 69 U.S. 10, 2 Wall. 10, 17 L.Ed. 776; *Furman v. Nichol*, 75 U.S. 44, 8 Wall. 44, 19 L.Ed. 370.

A right arising out of such a contract is a limitation on the reserved power to amend corporate articles (Article XIII, Section 2, Ohio Constitution) and a statute "may not be applied retroactively to permit an alteration of the terms

of a contract made by a private corporation with its shareholders prior to the date of the enactment of statute". So it was held in *Wheatley v. The A. I. Root Co.*, (1946), 147 Ohio St. 127, 69 N.E. 2d 187, wherein the Supreme Court of Ohio expressly says:

> "The reservation of power of the state to alter or repeal general laws authorizing the formation of corporations, as set forth in Section 2, Article XIII of the Constitution of Ohio, *is limited* by the provision of Section 28, Article II that 'The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts' * * *." (Emphasis added).

The Court of Appeals recognized those rules as being the law of Ohio when it said in its opinion (Petitioners' Appendix, p. 43):

> "We recognize that in Ohio, as elsewhere, there is a reserved statutory power under which the charter of a corporation can be subsequently amended without violating the sanctity of the contract between the state and the corporation. (Citing cases). But, *this does not include* the right on the part of the state, acting through the stockholders of the corporation, to amend the charter *retroactively* in a way which will impair *vested rights previously acquired* under a contract between the corporation and parties other than stockholders." (Emphasis added).

That holding coincides with this Court's decision in *Superior Water, Light & Power Co. v. City of Superior*, (1923), 263 U.S. 125. That rule is admitted by petitioners, at page 15 of the Petition, where they concede "that the reserve power of amendment cannot be exercised to impair or destroy rights of contract which vested prior to the exercise of the power".

C. The Stockholders Cannot Relieve Their Stock of Restrictions by Which They Agreed to be Bound When They Acquired Such Stock

Constitutional questions aside, a very plain reason why the proposed charter amendment was held invalid below is that it constituted a breach of the stockholders' express contractual undertaking to be bound by the restrictions and limitations as set out in Article V of the charter. In its decision, affirmed without qualification by the Court of Appeals, the District Court specifically declared that the stockholders could not relieve their stock of the restrictions and limitations of the charter of Columbus Mutual,

> "to which restrictions and limitations they consented and by which they agreed to be bound when they acquired said stock". (Petitioners' Appendix, p. 30.)

Each stock certificate, including those acquired in 1956 by the principal petitioner herein, The Ohio State Life Insurance Company, bears on its face the following legend:

> "This certificate of stock is issued and accepted subject to the terms and conditions of the Articles of Incorporation of the company, to which reference is hereby made". (Respondents' Appendix pp. 17a-18a, 37a).

This language was inserted in the stock certificates by express command of Article V of the charter which required all stock subscriptions and certificates to contain a provision whereby the subscriber and stockholder "shall agree and assent to the provisions of this charter". (Respondents' Appendix, p. 5a, 35a).

The purpose and effect of this requirement, and of the legend on the stock certificates, is at once apparent. In separating the voting power and management of the Company from the beneficial ownership of it, the founders of Columbus Mutual foresaw that the stockholders, as trustees

of the voting power, might be tempted to abuse that power precisely as Petitioners are abusing it here, that is, by seeking to enlarge their own narrowly limited interests in the company at the expense of the policyholders. Such an attempt would be forestalled, it was thought, if the stockholders were required to acknowledge and consent to the limitations and restrictions, imposed upon their stock under Article V.

That, precisely, was what the legend on the stock certificates was designed to accomplish. It was not an empty agreement by the stockholders to abide by whatever they might from time to time see fit to amend the charter to provide. It is not to be supposed that the founders of Columbus Mutual would have gone to such lengths to spell out any such self-evident proposition. The stockholders were committed to the *then existing* "terms and conditions" of a *then existing* charter, which were incorporated by reference in their stock certificates.

We do not suggest, and the lower courts did not hold, that the legend on the stock certificates precluded the stockholders from ever making any amendment of any kind in the corporate charter. What the stockholders are precluded from doing is to adopt an amendment which operates either to enlarge their own interests in the company beyond those spelled out in Article V, or otherwise to impair the substantive rights and interests of the policyholders.

The facts, incidentally, that in 1956 The Ohio State Life Insurance Company paid $1,300.00 per share for stock which under the charter was redeemable for $200.00 per share, and in November of the same year was already proposing to amend Article V out of the charter, strongly suggest that Ohio State Life intended from the outset to dishonor its agreement to be bound by Article V. (Respondents' Appendix pp. 6a, 7a, 36a)

Although Ohio State Life acquired control of Columbus Mutual for the avowed purpose of merging the two companies (Respondents' Appendix p. 10a), its real reason for trying to make the proposed amendment is crystal clear. Its real purpose was to put the present policyholders in such a position that they would have no rights or interests in the earnings or surplus of Columbus Mutual, and to put the stockholders in such position that the existing surplus, its increment and all future surplus would belong to the stockholders. If that had not been the case, then it would not have been necessary for the petitioners to attempt to amend Article V.

D. No Proposed Amendment "Entirely Prospective in Operation", is Before This Court

In their Petition for Rehearing in the Court of Appeals, the petitioners expressed their "earnest belief" that the proposed amendment was "entirely *prospective*" in operation. Now, in this Court, they reiterate that view when they say (Petition, p. 16) that the Court of Appeals erroneously determined that the proposed amendment would retroactively impair vested contractual rights to future surplus and profits conferred upon the mutual plan policyholders by Article V.

The Court of Appeals did no such thing! Neither lower Court made any such statement! What the lower Courts held was:

> (1) Article V limits the rights of the stockholders as set forth therein and reserves all other beneficial proprietary rights to the policyholders.
>
> (2) The proposed amendment would be an impairment of the contract obligations of the corporation running to the policyholders.

As we have shown above (pp 9 to 12, supra) there are at least seven particulars in which the proposed amendment

would destroy or impair existing, vested, contractual rights of the policyholders. Whether the proposed amendment is prospective to any extent in its operation is immaterial, because it *is* retroactive. *This proposed amendment* cannot be adopted because of its retroactive effect. That ends *this* case.

If the petitioners should propose some other and different amendment of Article V which would not impair or destroy any existing, vested, contractual rights of the policyholders, such an amendment might present the question that petitioners seek to argue. But such an amendment would probably constitute the basis for a different law suit, in which full exploration of all the facts could be made in the trial court. Certainly this Court will not rule "in a vacuum", so to speak, and render an advisory opinion without knowing the terms of some new amendment and the factual aspects of its operation.

If the proposed amendment were to be adopted, the existing surplus of Columbus Mutual ($12,000,000.00) and the voluntary reserves ($9,000,000.00) would no longer belong to the policyholders, because the proposed amendment deletes the language of Article V conferring such rights of ownership. (See pages 10 and 11, supra). Yet the petitioners tell this Court that they seek no review of the decision of the Court of Appeals sustaining those rights of the policyholders.

Originally, as the record shows (Respondents' Appendix, pp. 35a, 36a, 37a, 40a, 44a, 45a), the petitioners contended that the ownership of Columbus Mutual lay exclusively in its stockholders, that the surplus belonged to the stockholders, and that the policyholders had "no right, title or interest in or to said surplus".

After the Court of Appeals announced its decision, petitioners, in their Petition for Rehearing, began to change

their tune. They abandoned their former position as to the ownership of the surplus and conceded that the decision had settled "the question of whether Article V of the charter confers vested contractual rights in and to the company's surplus upon the mutual plan policyholders." (Petition for Rehearing, p. 10). They expressly told the Court of Appeals that they sought no rehearing of that Court's determination that the "beneficial ownership of the company's existing surplus is vested in the company's mutual plan or participating policyholders" and that the contractual rights of the policyholders "are protected by Article I, Section 10 of the Constitution of the United States." (Petition for Rehearing, p. 2).

Now, in this Court, the petitioners seek to contend that their proposed amendment is purely prospective and not retroactive, as the Court of Appeals held.

The petitioners talk about *future* surpluses and profits, but they ignore the conceded fact that most, if not all, of the surplus and profits to be accumulated by Columbus Mutual in future years will come from the aggregate overcharges of premiums assessed against the policyholders under the plan of doing business followed by this company. (See pp. 9 and 10, supra, and Respondents' Appendix, pp. 22a-23a, and 40a). An amendment which would appropriate such funds to the unrestricted use of the stockholders would not be "entirely prospective in operation" against these policyholders who are the beneficiaries of the contractual safeguards of Article V.

What, then, is the amendment "entirely prospective in operation" that petitioners seek to validate in this appeal? It is clearly not the proposed amendment set forth in Petitioners' Appendix, at pages 57 to 60, because that proposed amendment is obviously retroactive in its effect upon the vested contractual rights of the policyholders.

E. The Proposed Amendment, if Permitted, Would Deprive the Policyholders of Vested Property Rights Without Notice, Acquiescence, and Due Process of Law

The proposed charter amendment was adopted at a meeting of the stockholders, wholly without notice to, or consultation with, the mutual-plan policyholders, whose property rights, as we have previously shown, were so drastically affected thereby. Not only were these policyholders, (whom the lower courts held, and even Petitioners now concede, to be the beneficial owners of the corporate surplus,) to be deprived of that surplus without notice or opportunity to be heard, but they were to be afforded no compensation whatever for the deprivation of their rights. More than $19,000,000 of surplus (Petitioners' Appendix, p. 32), which under Article V of the original charter belonged to these policyholders, would have ceased to "belong" to them under the proposed amendment, but instead was to be held "for their protection". (Appendix, Petition for Certiorari, pages 58-59.) Perhaps these policyholders may be forgiven for holding suspect those who would take from them their property in order to hold it "for their protection."

Can this be "due process"? The lower courts had little difficulty in concluding that it was not. The specific holding of the District Court was

> "(3) That the mutual plan policyholders of Columbus Mutual would be deprived of vested property rights in the surplus without notice, acquiescence and due process of law if the proposed amendment were permitted." (Supplemental Opinion of District Court, Appendix, Petition for Certiorari, page 30.)

The Court of Appeals affirmed the declaratory judgment of the District Court without qualification.[1] (Petitioners' Appendix, p. 45.)

In the landmark case of *Huber v. Martin*, 127 Wis. 412, 105 N.W. 1031; 3 L.R.A. (N.S.) 653, the Supreme Court of Wisconsin struck down as unconstitutional a Wisconsin statute purporting to authorize the conversion of a mutual insurance company into a stock company without adequate compensation to the policyholders for the deprivation of their rights. In so deciding, Judge Marshall said, 127 Wis. 412, p. 439, 105 N.W. 1031, p. 1040:

> "Due process of law does not extend to the taking of private property or the violation of private rights for private ends. The act of the legislature in question, in terms or in effect, authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members thereof to the use of another private corporation and of its members in violation of the corporate charter rights of the former corporation, and in defiance of the wishes of such of its members as do not choose to consent thereto."

In point of fact, the case at bar presents an even clearer case of unconstitutionality than *Huber v. Martin*, supra. Thus, in the *Huber* case there was a Wisconsin statute *specifically* authorizing the "demutualization" of a mutual company; in the case at bar there is no such statutory

[1] Though the Court of Appeals opinion did not dwell upon the "due process" question as such, its basic approval of the District Court holding in this regard appears from the following statement of the Court of Appeals, (Petitioners' Appendix, p. 39; 274 F. 2d 771, 776): "It does not necessarily follow that since Columbus Mutual was a stock corporation, its assets, including surplus, were legally owned by its stockholders to the exclusion of any interest therein by the policyholders on the mutual plan, with the result that the stockholders could deal with the surplus *without obtaining the consent and over the objections of the policyholders*." (Emphasis added.)

authority.[2] In the *Huber* case the statute provided for notice to policyholders; in the case at bar there was no such notice. In the *Huber* case the policyholders had the right to vote; not so in the case at bar. In the *Huber* case the policyholders were given preemptive rights to take some (though insufficient, the court held) stock in the new company. The policyholders have no such rights in the case at bar. In the *Huber* case the statute provided for some (though wholly inadequate) compensation to dissenting policyholders for the surrender of their interests. In the case at bar the policyholders would receive no compensation whatsoever.

It avails Petitioners nothing to speak of the reserved power of the legislature to amend, or authorize amendments of, corporate charters. This argument was specifically rejected by Judge Marshall in the *Huber* case, 127 Wis. 412, p. 434, 105 N.W. 1031, p. 1038. Certainly, the reserved power cannot override the basic dictates of that "sense of fair play—which is the essence of due process". (See opinion of Mr. Justice Frankfurter, *Galvan v. Press*, 347 U.S. 522, 530, 74 S.Ct. 737, 742) As stated by this court in *Shields v. Ohio*, 95 U. S. 319, 324:

[2] Petitioners purport to find authority for their proposed amendment in the general charter amendment statute, Sections 1701.69 and 1701.71, Revised Code of Ohio (Petitioners' Appendix, pp. 62-66). Actually, this statute, a part of the Ohio General Corporation Act, does not deal with insurance companies. Much less does it authorize the conversion of a mutual or "mixed" insurance company into a pure stock company on any basis. Furthermore, the Ohio charter amendment statutes are careful to provide for a vote of all stockholders of a corporation, whether or not holders of stock ordinarily entitled to vote, upon any proposed amendment substantially affecting their rights, and for the payment to dissenting shareholders of the appraised value of their interests. If, as Petitioners now concede, the mutual plan policyholders of Columbus Mutual are the beneficial owners of the company, it is unthinkable that the Ohio legislature could have intended to authorize the Columbus Mutual stockholders to oust the policyholders of their rights without a vote and without compensation for the loss of their property.

> "The power of alteration and amendment is not without limit. The alterations must be *reasonable*, they must be made in *good faith*, and be *consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted* under the guise of amendment or alteration." (Emphasis added.)

Was it "reasonable" for these stockholders of Columbus Mutual to have used the voting power, entrusted to them by the incorporators, for the selfish purpose of removing the restrictions and limitations upon their interests in the company, imposed upon them under Article V of the original charter? Was it "good faith" for these stockholders to have sought to repudiate the terms of the charter, after having expressly accepted their stock, "subject to the terms and conditions of the Articles of Incorporation", which were incorporated by reference on all stock certificates? Was it "consistent with the scope and object of the act of incorporation" for these shareholders to have attempted to delete from the charter the corporate purpose, set forth therein, eventually to retire the stock and become a fully mutual company? Or, alternatively, was the charter amendment here proposed a flagrant example of the kind of "sheer oppression and wrong", which this court has said, "cannot be inflicted under the guise of amendment or alteration?" *Shields v. Ohio*, supra, 95 U. S. 319, p. 324.

As Judge Marshall said in *Huber v. Martin*, supra, 127 Wis. 412, 105 N.W. 1031, 3 LRA (N.S.) 653, 657-658:

> "This very statement of the (company's) position * * * so shocks the moral sense that one is inclined to enter upon a study of the subject with the impression that no substantial basis can be found for it in the law."

CONCLUSION

In 1956 The Ohio State Life Insurance Company purchased 99.54% of the stock of The Columbus Mutual Life Insurance Company at a per share price almost four times as great as it was subsequently permitted by state insurance authorities to carry it on its books. It gambled that it would be able to relieve its Columbus Mutual stock of the conditions and limitations set out in Article V of the charter, thereby greatly enriching itself far beyond the purchase price.

When it purchased the stock Ohio State expressly agreed to be bound by the charter of Columbus Mutual (for it could not otherwise buy the stock); and it immediately undertook to do exactly what it had just finished contracting not to do—destroy Article V, which is the heart of the Columbus Mutual charter.

It proposed an amendment to Article V that would eliminate the aforementioned limitations, thereby effectively transferring ownership of the immense surplus of Columbus Mutual from its policyholders to the stockholders, notably The Ohio State Life Insurance Company.

The policyholders of Columbus Mutual (who had been given neither voice nor vote on the proposed amendment) protested in vain and then took their grievance to the District Court. That Court and subsequently the Court of Appeals prohibited the adoption of the proposed amendment because it would operate to deprive the policyholders of their vested proprietary interests in the surplus of Columbus Mutual without due process of law and because it would operate retroactively to impair the contractual obligations of the corporation to the policyholders.

That is all that there is to this case! No prospectively operating charter amendment that would not invade the

policyholders' surplus was before the courts below; nor is it here. What is sought, therefore, is an advisory opinion which would be of no great moment to anyone except to the parties to this case.

The Columbus Mutual charter is unique, but plain and clear in its terms; there is no sound corporate purpose for the amendment (it is simply an attempted "raid" by the stockholders on the policyholders' surplus); there is no prohibition against *prospective* charter amendments in the opinions and orders of the Courts below; and the prior decisions in this case are strictly consistent with all of the Ohio cases cited therein and in all of the briefs.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the United States District Court for the Southern District of Ohio, Eastern Division

Ray A. Clark, et al., Plaintiffs, vs. The Ohio State Life Insurance Company, et al., Defendants.	Civil Action No. 5146

RESPONDENTS' APPENDIX

For the convenience of the Court, there are hereinafter set forth the Amended Complaint, Answer and Counter Claim, Reply, and Amendment of Answer that were filed in the District Court. These pleadings are set forth at pages 4a to 53a, inclusive, of the record filed in this Court by the petitioners. Certain typographical errors have been corrected to conform to the original documents.

AMENDED COMPLAINT

[Filed March 28, 1958.]

1. Plaintiffs are, and at the times of all transactions herein complained of were, mutual plan policyholders of The Columbus Mutual Life Insurance Company (herein called "Columbus Mutual"). Plaintiff, Ray A. Clark, is a citizen and resident of the State of Indiana. Plaintiff Ralph P. Lounsbury, is a citizen and resident of the State of New Jersey. Plaintiff, Dr. George Lister, is a citizen and resident of the State of Florida. Plaintiff, Leonard Rosenberg, is a citizen and resident of the State of

Maryland. Plaintiff, David A. Shepherd, is a citizen and resident of the State of Tennessee. Plaintiffs, Ray A. Clark and Leonard R. Rosenberg, are also stockholders of Columbus Mutual and they have opposed, resisted and voted against the actions of said company's stockholders and directors hereinafter complained of.

2. Plaintiffs bring this action on behalf of themselves, and on behalf of Columbus Mutual, and on behalf of all mutual plan policyholders of Columbus Mutual, who number approximately 160,000 persons and are so numerous as to make it impracticable to bring them all before this court. This action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. There is an actual justiciable controversy between the plaintiffs and the class they represent and the defendants with respect to all matters as to which a declaratory judgment is sought in this action.

3. Defendant, The Ohio State Life Insurance Company (herein called "Ohio State") is a stock insurance company organized in 1906 and existing under the laws of the State of Ohio, with its principal office in Columbus, Ohio. Defendant, Columbus Mutual, is an insurance company organized in 1906 under the insurance laws of the State of Ohio, with its principal office in Columbus, Ohio, which, at all times since its organization has written substantially all of its policies of life insurance on the mutual plan. Said defendants are citizens of the State of Ohio and are residents of the Southern District of Ohio.

4. The defendants, Allen G. Aigler and Robert H. Campbell are citizens of the State of Ohio and are residents of the Northern District of Ohio. All of the other defendants are citizens of the State of Ohio and are residents of the Southern District of Ohio.

5. On or about January 6, 1956, the defendant, Ohio State, purchased 4810 shares of Columbus Mutual's stock and, during the year 1956, purchased additional shares of such stock, so that on December 31, 1956, and ever since, Ohio State has owned 4,977 of the 5,000 issued and outstanding shares of Columbus Mutual's stock, to-wit, 99.54% thereof. On or about January 28, 1957, and again on January 27, 1958, Ohio State voted said shares to elect the directors of Columbus Mutual who then and now hold their offices. Ohio State has had and now has absolute control of Columbus Mutual and its directors, and Ohio State has voted its said stock of Columbus Mutual to accomplish the matters herein complained of. Plaintiffs, in person, by mail, and by counsel have complained of and objected to the matters herein complained of but to no avail. No demand has been made upon the directors of Columbus Mutual to bring this action for the reason that said directors, or a majority of them, are controlled by Ohio State and any such demand would, therefore, be futile.

6. The defendant, Frederick E. Jones, is president of Ohio State and Columbus Mutual, and is a director and stockholder of both companies. The defendant, Frank L. Barnes, is vice president of Ohio State and Columbus Mutual and is a director and stockholder of both companies. The defendant, I. Malcolm McCampbell, is vice president and actuary of Ohio State and is a director and stockholder of both companies. The defendants, Frank A. Burgess and Charles F. Bruny, are directors and stockholders of both companies. The defendant, Thomas F. Ross, is vice president, medical director, a director and a stockholder of Ohio State. The defendants, David C. Morgan and Howard W. Kraft, are vice presidents, directors and stockholders of Ohio State. The defendants, Darrol R. Johnson, Allen G. Aigler, Dr. Rees E. Tulloss, Stanton G. Prentiss, Carl E.

Steeb, Robert H. Campbell, Walter F. Eberle, Robert N. Lupfer and Edward A. Sauer are directors and stockholders of Ohio State. The defendants, Ben F. Hadley and Donald J. Hoskins, are vice presidents, directors and stockholders of Columbus Mutual, and, on belief, are also stockholders of Ohio State. The defendant, Danforth E. Ball, Jr., is treasurer of Columbus Mutual and is a director and stockholder of said company. The defendants, W. Lyman Case, Carl Mitcheltree, Donald C. Power and Jay Shaw, Sr., are directors and stockholders of Columbus Mutual.

7. This court has jurisdiction of this action because the matter in controversy exceeds the sum or value of $3000.00, exclusive of interest and costs, and because it arises under the Constitution of the United States, and because there is diversity of citizenship of the parties hereto.

8. Article V of the articles of incorporation of Columbus Mutual, in full force and effect at all times from November 17, 1906 to the present date, provides:

> "Fifth. Dividends may be declared and paid on the outstanding stock; provided that the total dividends declared or paid shall not exceed an amount computed at the rate of ten (10) per cent per annum on the par value of the stock from the date of original issue to the date of its retirement, and, provided further that no dividend will exceed an amount equal to ten (10) per cent per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.
>
> "Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of two hundred dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the

holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. Subject, however, to the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.

"When all of said capital stock shall have been so retired and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, said company shall be reorganized, reincorporated or converted, in any manner permitted by law, into a mutual company composed of the policyholders in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock shall agree and assent to the provisions of this charter."

9. By virtue of said provisions of said Article V of Columbus Mutual's articles of incorporation, the surplus of said company belongs to the holders of its policies on the mutual plan, that is, its mutual plan policyholders, who are hereinafter referred to as the "policyholders", subject only to the limited rights of Columbus Mutual's stockholders to receive dividends equal to 10% on the par value ($100.00) of their stock and to receive $200.00 per share for their stock upon its retirement. Plaintiffs, and the policyholders in whose behalf they bring this action, are legally the

owners of the surplus of Columbus Mutual and, as such, are the equitable and beneficial owners of said company. Ever since Ohio State purchased said 4,810 shares of Columbus Mutual's stock on or about January 6, 1956, Ohio State and the individual defendants have been taking actions and carrying on activities for the purpose and with the objective of taking Columbus Mutual's surplus away from its policyholders and causing said surplus to belong to its stockholders, and Ohio State and its directors, defendants herein, have been and are exercising Ohio State's absolute voting control of Columbus Mutual's stock so to do, as is more particularly hereinafter set forth.

10. The 5,000 authorized, issued and outstanding shares of the stock of Columbus Mutual have a par value of $100.00 per share. Ohio State paid $1,300.00 per share for the stock that it purchased, as aforesaid, and made said payment by expending $6,470,100.00 of Ohio State's surplus funds, which constituted more than five per cent of Ohio State's total admitted assets. But for the restrictions and limiations imposed by said Article V on the rights of Columbus Mutual's stockholders, plaintiffs believe and aver that said company's stock, as of about January 6, 1956, would have been reasonably worth approximately $5,000.00 or more per share and today would be reasonably worth approximately $6,000.00 or more per share. At the time Ohio State purchased Columbus Mutual's stock, it was the plan and program of Ohio State, its stockholders and directors to vote Columbus Mutual's stock so as to merge Columbus Mutual into Ohio State and thereby add the net worth of Columbus Mutual to the net worth of Ohio State, a result of which would have been to increase the reasonable worth of the stock of Ohio State, the company surviving the merger, by a substantial amount, which plaintiffs aver, on belief, would have been by about $200.00 per share for

each of Ohio State's 100,000 shares, that is by approximately $20,000,000.00.

11. When Ohio State filed its annual statement as of December 31, 1956, with the superintendent of insurance of the State of Ohio, as required by law, it valued the stock of Columbus Mutual then owned by it at $6,470,100.00, the amount for which it had been purchased at $1,300.00 per share. Thereafter, an examination of Ohio State was made by representatives of the insurance departments of the States of Ohio, Kentucky, Michigan, California and Pennsylvania. In their report of examination, said examiners reduced the valuation of Columbus Mutual's stock on the books of Ohio State, to $333.00 per share. This was done because The National Association of Insurance Commissioners, an association which determines the valuation at which life insurance companies may carry their investments on their books, had determined that the stock of Columbus Mutual should be carried on Ohio State's books at a valuation of $333.00 per share so long as the provisions of said Article V remained in effect. The effect of the foregoing has been to reduce the surplus of Ohio State by $4,805,990.00, which plaintiffs believe and aver has resulted in a like reduction in the value of Ohio State's stock.

12. At a meeting of Columbus Mutual's stockholders held on November 19, 1956, the controlling shares of said company owned by Ohio State were voted in favor of a resolution to amend Columbus Mutual's articles of incorporation, which resolution was then adopted and recited an intent "to eliminate all of the provisions and restrictions of" Article V of said articles and proposing that the "present free surplus" should be preserved "for the protection of policyholders". Plaintiff, Ray A. Clark, and other stockholders, and policyholders, in person, by mail, and subse-

quently through counsel, opposed said proposal and it was abandoned.

13. At a meeting of Columbus Mutual's stockholders held on February 25, 1957, the 99.54% of the shares of said company owned by Ohio State were voted in favor of a resolution to amend Columbus Mutual's articles of incorporation, which resolution was then adopted and provided, as follows:

"Whereas, The Ohio State Life Insurance Company, a legal reserve life insurance company, organized under the laws of Ohio, and doing business as a stock company, writing primarily participating policies, has acquired 97.7 per cent of the shares of The Columbus Mutual Life Insurance Company, a stock company, doing business on the mutual plan, and

"Whereas, it is the desire of the stockholders of both companies to merge The Columbus Mutual Life Insurance Company into The Ohio State Life Insurance Company, thus creating a single legal reserve life insurance company of almost double the number of policyholders and affording greater protection to all policyholders of both companies on account of almost double breadth of coverage, as well as more efficient and economical management, and

"Whereas, in order to effect such merger, it is necessary first to amend the Articles of Incorporation of The Columbus Mutual Life Insurance Company in order that it may prospectively conduct its business in conformity with the method of business of The Ohio State Life Insurance Company writing primarily participating insurance while fully protecting its present policyholders holding policies on the mutual plan, now, therefore,

"Be it resolved, That the Articles of Incorporation of The Columbus Mutual Life Insurance Company (as

amended) be and the same hereby are amended by the addition of the following paragraph at the end of the Fifth Article thereof:

"'It is provided however that the foregoing provisions of this Article shall have no application to that portion of the earnings or surplus attributable to policies issued after the effective date of this article.'

"Be it further resolved, that upon the filing of the foregoing amendment in the office of the Secretary of State and the approval thereof, the officers and directors of this company are directed to call a special stockholders' meeting for the purpose of taking all necessary steps as are required to effect su merger."

14. Shortly after February 25, 1957, defendants caused said proposed amendment to be filed with the Secretary of State of the State of Ohio, who submitted it to the Attorney General of Ohio for approval. Plaintiffs, Ray A. Clark, Leonard Rosenberg and Ralph R. Lounsbury, in person and through counsel, opposed said proposed amendment, and their counsel and counsel for said company filed briefs with the Attorney General of Ohio. In their reply brief, Columbus Mutual's attorneys, stating the position of the defendants herein, said to the Attorney General of Ohio:

"Far from being an attempt to deprive the policyholders of their rights, the proposed amendment seeks to protect those rights to an extent far greater than the law requires, for it is the company's position, and we believe it to be the law, that the policyholders have no right or title whatsoever even to the company's existing surplus save for the right to share in the divisible surplus at the end of each policy year *as apportioned by the company.*"

The Attorney General of Ohio did not certify to said proposed amendment, and, at a meeting of Columbus Mutual's stockholders held October 28, 1957, the resolution adopted on February 25, 1957, was rescinded.

15. Prior to October 28, 1957, Ohio State issued the following statement and requested that it be and it was set forth in said Report of Examination of The Ohio State Life Insurance Company as of December 31, 1956, made by representatives of the Insurance Departments of Ohio, Kentucky, Michigan, California and Pennsylvania, in which report it appears at page 44, as follows:

> "The purchase of ownership of the Columbus Mutual Life Insurance Company was authorized by the directors of the Ohio State Life Insurance Company with the thought of an eventual merger for the purpose of realizing the many advantages and economies arising out of combined operations.
>
> "At the present time, Management is proceeding to amend Section 5 of the Charter of The Columbus Mutual Life Insurance Company to conform to the Charter of The Ohio State Life Insurance Company insofar as business written in the future is concerned. However, all business in force and rights of existing policyholders will not be disturbed as the amendment will effect only new business.
>
> "After the proposed amendment is made, it is the intention of the Management of both companies to merge the two into one company, carrying Section 5 into the merger agreement and into the Charter of the new company for the continued and exclusive protection of the policyholders of the Columbus Mutual Life Insurance Company as their interests may appear under Section 5. Under these circumstances, it is quite apparent that complete ownership of The Columbus Mutual Life Insurance Company is far more than an investment in mere certificates of stocks. It must be evaluated from this investor's point of view according to the value received by this investor (Ohio State Life Insurance Company) which will be fully realized upon

merger of the two companies into the new Ohio State Life Insurance Company."

In accordance with their expressed intentions, as hereinbefore set forth, it is the plan and program of the defendants that the directors of Ohio State will vote said 99.54% of the shares of Columbus Mutual to accomplish the merger of said company in Ohio State Life and to incorporate the present proposed amendment of said Article V, hereinafter set forth, in the agreement of merger into which said companies will enter.

16. Said stockholders meeting of Columbus Mutual on October 28, 1957, was called by order of Ohio State as "a stockholder holding 4,977 shares out of a total of 5,000 shares of the voting stock" of Columbus Mutual, and by the defendant, Frederick E. Jones, as president of Columbus Mutual duly authorized by the unanimous vote of the executive committee of Columbus Mutual, all of whom are defendants herein. At said meeting said 4,977 shares of Columbus Mutual's stock owned by Ohio State were voted in favor of a resolution to amend Columbus Mutual's articles of incorporation, which resolution was adopted. Pursuant thereto, the defendant, Frank L. Barnes, and Orval J. Miller, as secretary of Columbus Mutual, on the same day, presented to the Secretary of State of the State of Ohio the following certificate of amendment:

"Certificate of Amendment,
to Articles of
The Columbus Mutual Life Insurance Company

Frank L. Barnes, first vice president, and Orval J. Miller, secretary, of The Columbus Mutual Life Insurance Company, an Ohio corporation with its principal

office located at 303 East Broad Street, Columbus, Ohio, do hereby certify that a meeting of the holders of the shares of said corporation entitling them to vote on the proposal to amend the articles of incorporation thereof, as contained in the following resolution, was duly called and held on the twenty-eighth day of October, 1957, at which meeting a quorum of such shareholders (and each class thereof) was present in person or by proxy, and that by the affirmative vote of the holders of shares entitling them to exercise 99.54% of the voting power of the corporation on such proposal the following resolution was adopted to amend the articles:

"Whereas, The Ohio State Life Insurance Company, a legal reserve life insurance company, organized under the laws of Ohio, has acquired 4,977 out of 5,000, or 99.54%, of the shares of The Columbus Mutual Life Insurance Company, both companies being stock companies writing policies primarily on the participating or mutual plan, and

"Whereas, The National Association of Insurance Commissioners, an association which determines the valuation at which life insurance companies may carry their investment in securities on their books, has determined that the stock of The Columbus Mutual Life Insurance Company may be caried on the books of The Ohio State Life Insurance Company at three hundred thirty three dollars ($333.00) per share so long as the provisions of Article V of the Articles of Incorporation of The Columbus Mutual Life Insurance Company remain in effect, and

"Whereas, the book value of the shares of stock of this company, as customarily computed for stock life

insurance companies and allowed by such association, is far in excess of three hundred thirty-three dollars ($333.00), and

"Whereas, it is being considered that the two companies may in the future merge, which would require that earnings of this company be handled in conformity with the methods employed by The Ohio State Life Insurance Company, while fully protecting its present participating policyholders, now, therefore,

"Be it resolved, that the Fifth Article of the Articles of Incorporation of The Columbus Mutual Life Insurance Company (as amended) be and the same hereby is amended to read as follows:

"Fifth. Unassigned surplus as of December 31, 1956, as shown on the annual statement filed with the Superintendent of Insurance of Ohio, to-wit: $10,739,205.07, shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company which are in force on the effective date of this amendment, and no dividends to any stockholder of the company shall be payable therefrom.

"Annually for a period of twenty-five (25) years after the effective date of this amendment, there shall be added to said special surplus for policyholders, as then existing, from the earnings of the company a percentage of such then existing special surplus for policyholders equal to the net earned interest rate on the mean invested assets after all taxes based on income.

"Regular dividends shall be paid from the earnings of the company to all participating policyholders of the company without distinction. Additional divi-

dends may be paid out of such special surplus for policyholders, as the directors in their sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of this amendment.

"In the event of dissolution and liquidation of the company at any time so long as any participating policies of the company in force on the effective date of this amendment are then in force, such policyholders shall be entitled to distribution from such special surplus for policyholders, as then existing, in amounts representing their percentage interest in such surplus at the time of the effective date of this amendment.

"At the maturity of the last participating policy of the company in force on the effective date of this amendment, the special surplus for policyholders, as then existing, shall be permanently held for the protection of all policyholders, and no dividends may at any time be declared to stockholders; except out of surplus over and above such amount.

"In witness whereof, said Frank L. Barnes, First Vice President, and Oryal J. Miller, Secretary, of The Columbus Mutual Life Insurance Company, acting for and on behalf of said corporation; have hereunto subscribed their names and caused the seal of said corporation to be hereunto affixed this twenty-eighth day of October, 1957.

By Frank L. Barnes,
First Vice President.
By Oryal J. Miller,
Secretary.

The Secretary of State submitted said certificate of amendment to the Attorney General of Ohio, who, on October 29, 1957, returned it to the Secretary of State endorsed, as follows:

"Approved: (See letter of transmittal and certification attached)
October 29, 1957
William Saxbe
Attorney General of Ohio."

In said "letter of transmittal and certificate attached", said Attorney General of Ohio said to said Secretary of State:

"You have submitted to me amendment to Articles of Incorporation of Columbus Mutual Life Insurance Co., dated October 28, 1957, for certification in accordance with Section 3907.03, Revised Code. After careful consideration I return said amendment to you with my approval endorsed thereon, with however the following observation:

"This company was incorporated under Ohio law in 1906, as a legal reserve stock life insurance company. The company in my opinion has a present legal right to amend its Articles of Incorporation being as it is a stock company, provided always that such amendment is not inconsistent with the constitution and laws of the United States and of this state.

"It is contended on behalf of some of the participating policyholders of this company that the amendment which you have submitted may not be recorded by you on the ground that it will deprive such policyholders of constitutional rights which they may have under the present charter of the company.

"Any decision reached by this office upon the complex questions raised by this amendment will not finally adjudicate the matter. It is recognized that the rights of some one hundred and fifty thousand policyholders are involved, which rights must and should in my judgment be finally determined by the Supreme Court.

"In view of those facts and in order that the rights of all parties affected may be finally so adjudicated

without delay, I have endorsed my approval upon the amendment and hereby certify the same as provided by such Section 3907.03, with, however, the advice to you that, as Secretary of State, you refuse to record such amendment and certificate.

"This course of procedure should enable the company to invoke the original jurisdiction of the Supreme Court, thus avoiding uncertainty and delay in the final determination of this matter. It is my opinion that facilitating and expediting this matter will best serve interests of the thousands of policyholders of this company, the shareholders, and the general public."

17. Said Secretary of State refused to record said certificate of amendment, and on November 4, 1957, the defendants caused Columbus Mutual to file, in the Supreme Court of Ohio, an original action in mandamus, being No. 35398, on the dockets of said court, wherein, the relator, Columbus Mutual, prayed for a peremptory writ of mandamus directing the Secretary of State to record said certificate together with the certificate of the Attorney General, in a book kept for that purpose.

18. The adoption of said proposed amendment on October 28, 1957, its submission to the Secretary of State, and the filing and prosecution of said original action in mandamus are parts of the plan and program of Ohio State and the individual defendants to deprive Columbus Mutual's policyholders of its surplus, which belongs to said policyholders, and constitute further steps in that plan and program of Ohio State and the individual defendants to cause said surplus to belong to Ohio State and its stockholders.

19. Plaintiffs applied for and were granted leave to intervene in said original action in mandamus, were made defendants therein, and were granted leave to and did file their answer briefs therein. The Supreme Court of Ohio, in a decision reported in 167 Ohio St., 309, rendered

February 11, 1958, rehearing denied, refused to grant said writ of mandamus on the ground and for the reason that the Attorney General of Ohio had not found and certified that said proposed amendment was in accordance with Sections 3907.01 to 3907.21, inclusive, of the Revised Code of Ohio, and not inconsistent with the Constitution and laws of the United States and of the State of Ohio.

20. Plaintiffs believe and aver that Ohio State and the individual defendants intend to and will continue their efforts to eliminate the restrictions and limitations contained in said Article V, intend to and will continue their efforts to merge Columbus Mutual into Ohio State, and intend to and will continue their plan and program to deprive Columbus Mutual's policyholders of its surplus, which belongs to said policyholders, and cause said surplus to belong to Ohio State and its stockholders.

21. Plaintiffs believe and aver that the dispute as to the ownership of the surplus of Columbus Mutual and the activities of Ohio State and the individual defendants with respect thereto, as herein set forth, have been and are prejudicing the welfare of Columbus Mutual and its policyholders, which will continue in the future, in that the result sought by Ohio State and the individual defendants, if accomplished, will reduce the security of Columbus Mutual's policyholders, will deprive them of its surplus which belongs to them, and will otherwise impair their rights as hereinafter more particularly set forth, all of which, plaintiffs believe and aver, has caused and in the future will cause loss of business, loss of profit, loss of surplus and loss of strength of Columbus Mutual.

22. In partial compliance with the requirement of said Article V that:

> "The subscriptions for such stock and the certificates of stock representing the same shall contain a provision

whereby the subscriber to and holder of such stock shall agree and assent to the provisions of this charter.",

the following statement is set forth on the face of each stock certificate of Columbus Mutual, including the certificates for the shares held by defendants herein:

"This certificate of stock is issued and accepted subject to the terms and conditions of the Articles of Incorporation of the company, to which reference is hereby made."

By purchasing said stock and accepting said stock certificates, Ohio State and the individual defendants who are stockholders of Columbus Mutual consented to be bound and are bound by all of the terms and conditions of relator's Articles of Incorporation, including said Article V, which is a contractual obligation for the benefit of Columbus Mutual's policyholders to whom its surplus belongs.

23. Pursuant to the provisions of said Article V, Columbus Mutual's paid-in surplus was returned to its stockholders in the year 1922. Columbus Mutual's directors have never acted to retire its issued and paid-up capital stock, as is contemplated and authorized by said Article V, and said directors have never taken any action to reorganize, re-incorporate, or convert said company into a pure mutual company composed of the policyholders of said company, as contemplated and authorized by said Article V. Since the year 1937, there have been in force and effect Ohio statutes providing for the mutualization of life insurance companies, Sections 9364-1, et seq., General Code, (now Sections 3913.01, et seq., Revised Code).

24. Columbus Mutual, by its name and otherwise, has held itself out to the public, to prospective policyholders,

and to its policyholders, as a mutual life insurance company, and the provisions of Article V of Columbus Mutual's articles of incorporation were in full force and effect when each and every policy now in force was issued by said company. Some, if not all, of Columbus Mutual's policyholders became such policyholders in reliance upon the provisions and limitations of said Article V and in reliance upon the representations that said company was a mutual life insurance company.

Plaintiffs believe and aver that in its annual statements, prior to 1956, filed with the Superintendent of Insurance of the State of Ohio, as required by law, which are public records, Columbus Mutual has been asked and has so answered the following question:

> Question: "Is the unassigned surplus * * * held for the stockholders or the policyholders?
>
> "Answer: Policyholders."

25. Plaintiffs believe and aver that Columbus Mutual has issued all of its life insurance policies on the level or fixed premium plan. Under this plan the maximum annual contribution which any policyholder can be called upon to pay is uniform or fixed throughout the life of his policy. In the calculation of its premium rates, Columbus Mutual has adopted one or more tables of mortality, showing the probable death rate for each age of life; it has adopted an assumed rate of interest which it might expect to realize upon its invested assets during the lifetime of each policy; it has computed premiums based thereon and has added thereto sums, known in the life insurance industry as "loading", for the purpose of conducting its business as well as any unforeseen contingencies such as an abnormal death rate due to war or pestilence. Columbus Mutual's premium rates, so calculated, have been in excess of said

company's requirements, and will continue so to be in the future on the basis of the experience of life insurance companies generally. In Columbus Mutual's experience, the actual death rate has been substantially lower than the expectancy shown in the mortality table which were assumed in calculating its premiums, and the interest rate which it has realized upon its investments has proved higher than the assumed rate. The "loading" has been greater than that required to cover the expense of conducting the business and to meet contingencies. After making due provision for a fair and adequate margin of safety each year, the excess has been added to Columbus Mutual's surplus. Said excess will continue to accumulate and constitutes and will continue to constitute Columbus Mutual's surplus which belongs to its policyholders.

26. The "unassigned surplus as of December 31, 1956" which, under said proposed amendment "shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company which are in force on the effective date of" said amendment is stated by Columbus Mutual to be in the amount of $10,739,205.07. In addition thereto, Columbus Mutual's surplus, which belongs to its policyholders, included the following amounts as of December 31, 1957:

A voluntary reserve for employees' pensions (which relator has no contractual obligation to pay) of	$1,245,747.00
Voluntary additional policy reserves of	2,400,000.00
A voluntary general contingency reserve of	1,428,156.56
A "mandatory security valuation reserve" of	221,550.03
A voluntary investment fluctuation reserve of	1,500,000.00
	$6,795,453.59

Plaintiffs believe and aver that since December 31, 1956, Columbus Mutual has earned a net profit to date of approximately $1,650,000.00; that the directors of Columbus Mutual, elected by Ohio State by voting its stock of Columbus Mutual, have added $329,801.00 thereof to said reserve for employees' pensions, have used $250,000.00 thereof to establish a reserve for an agents' pension plan (which Columbus Mutual has no contractual obligation to pay), and have allocated from the remainder $479,139.89 to the "unassigned surplus". Plaintiffs believe and aver that the entire amount of said $1,650,000.00 is actually part of Columbus Mutual's surplus which belongs to its policyholders.

According to the annual statements of Columbus Mutual, filed with the Superintendent of Insurance of the State of Ohio, as required by law, the "unassigned surplus" of Columbus Mutual has increased by the following amounts in each of the six years last past:

	"Unassigned Surplus"	Voluntary Reserves	Total Surplus
1952	$339,428.46	$ 600,000.00	$ 939,428.46
1953	665,669.17	600,000.00	1,265,669.17
1954	590,489.18	300,000.00	890,489.18
1955	645,978.06	802,585.00	1,448,563.06
1956	890,320.82	738,561.00	1,628,882.82
1957	479,139.89	1,171,869.23	1,651,009.12

Plaintiffs believe and aver that if the plan and program of the defendants, as herein set forth, is permitted to be consummated, future increases in Columbus Mutual's surplus, which are reasonably probable, will not belong to its policyholders, as in the past and now, but will, to the extent of 99.54% thereof, belong to and all of them may be disposed of by Ohio State as the stockholder having absolute control of Columbus Mutual.

27. Columbus Mutual's assets amounted to $126,681,541.72, as of December 31, 1956, and plaintiffs believe and aver that they have increased by approximately $8,201,563.43 since that date. Except for $500,000.00 paid in by Columbus Mutual's stockholders for their stock, in 1922, and prior thereto, plaintiffs believe and aver that all of said assets have been accumulated from the premiums paid by Columbus Mutual's policyholders. Columbus Mutual's stockholders have been receiving the maximum dividends on their stock, at the rate of 10% of the par value thereof, as provided by said Article V, and said dividends have been paid out of Columbus Mutual's common earnings, to which its policyholders have contributed by their premiums as aforesaid. Plaintiffs believe and aver that if the plan and program of the defendants, as herein set forth, is permitted to be consummated, all of said assets, and the future increase thereof, will belong to Ohio State, to the extent of 99.54% thereof, subject only to the payment of Columbus Mutual's actual liabilities.

28. Comparative figures for Ohio State and Columbus Mutual as of December 31, 1957, which is the last date at which detailed figures are available to plaintiffs were, as follows:

	Ohio State	Columbus Mutual
Insurance in force	$484,955,905.77	$479,919,138.00
Total assets	88,614,777.57	134,883,105.15
Unassigned surplus	4,936,371.26	11,218,344.96
Reserve for employees pensions	none	1,245,747.00
Additional policy reserves	none	2,400,000.00
General contingent reserve	none	1,428,156.56
Security valuation reserve	136,384.56	221,550.03
Investment fluctuation reserve	none	1,500,000.00

Plaintiffs aver, on information and belief, that Columbus Mutual has certain additional assets, which, though not reflected in the corporate balance sheet, constitute a valu-

able part of the true surplus of the company, belonging to the policyholders under Article V of the Charter. One of such assets is the insurance in force, shown above, which contributes substantially to the annual increases in the surplus of the company and for which, plaintiffs believe, a purchasing insurance company would pay in excess of $10,000,000.00. Another such asset is the value of the Columbus Mutual agency organization, which, over the five-year period, ending on December 31, 1957, has produced the following amounts of business:

1953	$46,904,333
1954	50,600,365
1955	54,230,864
1956	61,868,430
1957	65,406,162

Plaintiffs believe and aver that a purchasing insurance company would pay in excess of $1,000,000 for the Columbus Mutual agency force alone. Plaintiffs allege that it is part of the plan and program of the Ohio State to take over these assets.

29. Plaintiffs believe and aver that the plan and program of Ohio State and the individual defendants, as herein set forth, constitutes misconduct and a breach of trust on their part and is in violation of their fiduciary duty to Columbus Mutual and its policyholders, because it constitutes the exercise of their absolute control of Columbus Mutual to capture and appropriate to the exclusive use of Ohio State and its directors and stockholders the surplus of Columbus Mutual which belongs to its policyholders whose premium payments on the mutual plan, as aforesaid, have created it. Plaintiffs believe and aver that said plan and program of the defendants is grossly unfair and unjust to Columbus Mutual and its policyholders, for the reasons set forth herein.

30. One principal objective of Ohio State and the individual defendants in carrying forward their plan and program, as herein set forth, is to eliminate the restrictions now contained in said Article V and thereby restore said sum of $4,805,990.00 (see paragraph 11 hereof) to the surplus of Ohio State and thus to increase the value of its stock.

31. Another principal objective of Ohio State and the individual defendants in carrying forward their plan and program as herein set forth, is to convert Columbus Mutual into a pure stock insurance company so that it may be merged into Ohio State and handle Columbus Mutual's earnings and conduct its business in conformity with the methods employed by Ohio State, the effect of which, plaintiffs believe and aver, will be to increase the net worth of Ohio State and its stock by approximately $20,000,000.00, which now belongs to Columbus Mutual's policyholders, without any compensation to them therefor. Ohio State is chartered to write insurance "on the stock plan" and its Amended Articles and Charter confer no rights or privileges whatsover on its policyholders and impose no restrictions or limitations of any kind or character on its stock or stockholders.

32. Plaintiffs believe and aver that the proposed amendment to Columbus Mutual's articles of incorporation (see paragraph 16, hereof), the proposed merger of Columbus Mutual into Ohio State on the basis proposed by the defendants, and the threatened capture and appropriation of Columbus Mutual's surplus and its conversion into property of Ohio State and its stockholders, as herein set forth, are in violation of Article I, Section 10, and the Fifth and Fourteenth Amendments of the Constitution of the United States of America, and Article I, Sections 1 and 19, and Article II, Section 28, of the Constitution of

Ohio, and are unlawful, unfair, inequitable, and violative of the rights of Columbus Mutual's policyholders in the following particulars, to-wit:

(a) The surplus of Columbus Mutual now belong to its policyholders, subject only to the limited rights of its stockholders to receive dividends equal to 10% on the par value ($100) of their stock, and to receive $200 per share for their stock upon its retirement. Said proposals will deprive Columbus Mutual's policyholders of that which now belongs to them, without compensation therefor and without due process of law.

(b) No statute of the State of Ohio permits the adoption of said proposed amendment.

(c) If Section 1701.69, Ohio Revised Code, or any other Ohio statute, can be interpreted to permit a domestic life insurance company to amend its articles of incorporation, which plaintiffs deny, then said statute, as applied to the proposed amendment of said Article V, is a law impairing the obligation of contracts and violates Article I, Section 10, of the Constitution of the United States of America, and Article II, Section 28, of the Constitution of Ohio.

(d) Said plan, program and proposals, if consummated, will deprive the policyholders of Columbus Mutual of their property without due process of law and without just compensation therefor, in violation of Article I, Sections 16 and 19, of the Constitution of Ohio.

(e) If any statute of the State of Ohio can be interpreted to permit said plan, program and proposals to be consummated, which plaintiffs deny, then such statute is violative of the Fourteenth Amendment of the Constitution of the United States of America which provides that no state shall deprive any person of property without due process of law, because the surplus of Columbus Mutual, which belongs to its policyholders, will be taken away

articles of incorporation, including Article V thereof as it now exists.

(q) The proposed amendment will destroy the mandatory provisions of said Article V that Columbus Mutual's surplus shall be apportioned and distributed to its policyholders.

(r) The proposed amendment, as a preliminary step in the plan and program of Ohio State to vote its 99.54% of Columbus Mutual's stock so as to merge said company into Ohio State, is unlawful, inequitable and unconstitutional because:

(1) Such proceedings will violate the rights of Columbus Mutual's policyholders to have it converted into a pure mutual company composed of its policyholders;

(2) The adoption of the proposed amendment in advance and in anticipation of the commencement of the merger proceedings will prevent the merger commission, prescribed by Section 3907.11, Revised Code, from protecting the interests of Columbus Mutual's policyholders with respect to the surplus that belongs to them under existing Article V of its articles of incorporation;

(3) The adoption of the proposed amendment in advance and in anticipation of the commencement of merger proceedings is not authorized by any statute;

(4) The adoption of the proposed amendment in advance and in anticipation of the commencement of merger proceedings is an attempt to evade the safeguards for Columbus Mutual's policyholders provided by Section 3907.11, Revised Code;

(5) The carrying out of the plan and program of merger will prevent the distribution of Columbus Mutual's surplus to its policyholders, but instead will convert such surplus into the property of Ohio State and its stockholders;

(6) Said merger will result in the dissolution of Columbus Mutual, but, under the proposed amendment, the surplus of Columbus Mutual will not be distributed to its policyholders because said amendment provides for only limited distribution and that only in the event of both dissolution and liquidation of said company.

(s) Under the proposed amendment, in the event of both the dissolution and liquidation of Columbus Mutual, those of the present policyholders whose policies are then in force will receive only some indefinite and undefined percentage interest in only the so-called "special surplus" created by said amendment; and all of the remaining "special surplus" and all of the other assets of Columbus Mutual, after the payment or securing of its obligations, will be distributed to the stockholders, which means that the stockholders will be unjustly enriched by receiving property which now belongs to policyholders.

(t) Under the proposed amendment, in the event of both the dissolution and liquidation of Columbus Mutual after the policies of its present policyholders are no longer in force, all of the surplus of Columbus Mutual will be distributed to its stockholders, which means that the stockholders will be unjustly enriched by receiving property which now belongs to the policyholders of Columbus Mutual.

(u) A result of the proposed amendment will be to convert a mutual or quasi-mutual life insurance company into a pure stock company without the knowledge or acquiescence of its policyholders whose vested property rights are prejudiced by such conversion, and without any authority in law so to do.

(v) Under the proposed amendment, there is no limit as to the amount that Columbus Mutual's directors, elected by Ohio State, may pay to Ohio State and Columbus Mutual's other stockholders upon the retirement or redemption of

any or all of the shares of stock held by them or any of them, and said amendment does not prohibit the use of the so-called "surplus surplus" for the retirement or redemption of any or all of said stock at any time or in any amount.

(w) The plan, program and proposals of the defendants, as above set forth, are in violation of the ultimate objective, spelled out in said Article V, that Columbus Mutual shall be a mutual insurance company composed of its policyholders, and, if consummated, will defeat the end for which said company was established.

33. Columbus Mutual and its policyholders will be greatly and irreparably damaged if the proposed plan, program and proposals of the defendants, or any part thereof, are consummated, and they have no adequate remedy at law.

WHEREFORE, plaintiffs, in behalf of themselves and of all policyholders similarly situated and in behalf of Columbus Mutual, pray:

(1) That this Court render its judgment herein declaring, as follows:

(a) That the surplus of Columbus Mutual belongs to its mutual plan policyholders, subject only to the limited rights of its stockholders to receive dividends equal to 10% on the par value ($100.00 per share) of their stock and to receive $200.00 per share for their stock upon its retirement.

(b) That no statute of the State of Ohio permits the adoption of the proposed amendment to Columbus Mutual's charter.

(c) That if Section 1707.69, Revised Code, or any other Ohio statute were interpreted to permit Columbus Mutual to adopt the proposed amendment to its charter, then said statute is a law impairing the obligation of contracts and violates Article I, Section 10, of the Constitution of the United States of America, and Article II, Section 28, of the Constitution of Ohio.

(d) That if any statute of the State of Ohio were interpreted to permit the aforesaid plan, program and proposals of the defendants to be consummated, such statute is in violation of the Fourteenth Amendment of the Constitution of the United States of America.

(e) That the aforesaid plan, program and proposals, of the defendants are in violation of Article I, Section 1, of the Constitution of Ohio.

(f) That the aforesaid plan, program and proposals of the defendants are in violation of Article I, Sections 16 and 19 of the Constitution of Ohio.

(g) That Ohio State and the individual defendants who are stockholders of Columbus Mutual stand in a fiduciary relationship to Columbus Mutual and its policyholders and cannot exercise their voting power so as to increase the value of their stock by relieving it of the restrictions and limitations of said Article V, to which they consented and by which they agreed to be bound when they acquired said stock.

(h) That the defendants are estopped to violate the ownership of Columbus Mutual's surplus by its mutual plan policyholders.

(i) That Columbus Mutual's surplus, as that term is used in said Article V, consists of all assets of Columbus Mutual, and the increase thereof, less only so much thereof as is actually needed to pay its liabilities as they accrue.

(j) That the proposed amendment of Columbus Mutual's charter will serve no valid business purpose of Columbus Mutual.

(k) That the aforesaid plan, program and proposals of the defendants are in breach of the express contractual undertaking of the Ohio State and the individual defendants who are stockholders of Columbus Mutual to be bound by the terms and conditions of Columbus Mutual's present

articles of incorporation, including said Article V as it now exists.

(l) That said Article V mandatorily requires that Columbus Mutual's surplus shall be apportioned and distributed to its mutual plan policyholders, and that said proposed amendment would destroy said mandatory requirement.

(m) That said proposed amendment, as a preliminary step in the plan and program of Ohio State to vote its 99.54% of Columbus Mutual's stock so as to merge said company into Ohio State, is unlawful, inequitable and unconstitutional because:

(1) Such proceedings will violate the rights of Columbus Mutual's policyholders to have it converted into a pure mutual company composed of its policyholders;

(2) The adoption of the proposed amendment in advance and in anticipation of the commencement of the merger proceedings will prevent the merger commission, prescribed by Section 3907.11, Revised Code, from protecting the interests of Columbus Mutual's policyholders with respect to the surplus that belongs to them under existing Article V of its articles of incorporation;

(3) The adoption of the proposed amendment in advance and in anticipation of the commencement of merger proceedings is not authorized by any statute;

(4) The adoption of the proposed amendment in advance and in anticipation of the commencement of merger proceedings is an attempt to evade the safeguards for Columbus Mutual's policyholders provided by Section 3907.11, Revised Code.

(5) The carrying out of the plan and program of merger will prevent the distribution of Columbus Mutual's surplus to its policyholders, but instead will convert such surplus into the property of Ohio State and its stockholders;

(6) Said merger will result in the dissolution of Columbus Mutual, but, under the proposed amendment, the surplus of Columbus Mutual will not be distributed to its policyholders because said amendment provides for only limited distribution and that only in the event of both dissolution and liquidation of said company.

(n) That under the proposed amendment Columbus Mutual would be converted into a pure stock insurance company without the knowledge or acquiescence of its policyholders which would prejudice their vested property rights.

(o) That said proposed amendment does not prohibit the use of the so-called "special surplus" for the retirement or redemption of any or all of Columbus Mutual's stock at any time for any amount.

(p) That the provisions of said Article V establish that Columbus Mutual is ultimately to be a mutual insurance company composed of its policyholders and without any stockholders, and that said result will be defeated if the proposed amendment becomes effective.

(q) That the directors or stockholders of Columbus Mutual have no power to merge it into any other insurance company or otherwise change or vary its present corporate structure until, first, its stock has been redeemed as provided for in said Article V, and, second, said company has been mutualized in the manner provided by law.

(r) That this Court declare that it is impossible to merge Columbus Mutual into Ohio State without destroying the rights of Columbus Mutual's policyholders. In the alternative, if the Court find that a merger would be lawful and possible, that the Court make an order requiring that in any such a merger the assets and liabilities of Columbus Mutual be segregated and separately administered in the sole and exclusive interest of Columbus Mutual's policy-

holders, subject only to the limited rights now conferred upon Columbus Mutual's stockholders by said Article V, and that from time to time in the course of such administration there be apportioned and distributed to Columbus Mutual's policyholders whatever amounts of Columbus Mutual's then existing surplus are not reasonably required for the security of said policyholders, to the end that when the last of Columbus Mutual's policies shall have matured and been paid, all of the surplus of Columbus Mutual and its accretion will have been apportioned and distributed to Columbus Mutual's policyholders.

2. That this Court grant to the plaintiffs such other and further relief as to the Court may seem just and proper in the premises and so as to make effective the declaratory judgment rendered in this cause, together with plaintiffs' costs and disbursements, including reasonable attorneys' fees, and that the defendant, Columbus Mutual, or the defendant, Ohio State, or both, be required to pay the same.

Edward B. Raub, Jr.,
William A. Wick,
Richard L. Miller,
Wm. E. Knepper,
Attorneys for Plaintiffs.

Of Counsel:
White, Raub & Forrey,
Knepper, White, Richards, Millere & Roberts.

[Duly verified.]

ANSWER AND COUNTER CLAIM

[Filed March 28, 1958.]

For answer to the amended complaint of plaintiffs in the above entitled cause, defendants above named say

1. Defendants admit the allegations contained in the first paragraph of the amended complaint.

2. Defendants admit the allegations contained in the second paragraph of the amended complaint.

3. Defendants admit the allegations contained in the third paragraph of the amended complaint.

4. Defendants admit the allegations contained in the fourth paragraph of the amended complaint.

5. Defendants admit the allegations contained in the fifth paragraph of the amended complaint.

6. Defendants admit the allegations contained in the sixth paragraph of the amended complaint.

7. Defendants admit the allegations contained in the seventh paragraph of the amended complaint.

8. Defendants admit the allegations contained in the eighth paragraph of the amended complaint.

9. Defendants deny that, by virtue of the present provisions of Article V of its articles of incorporation the surplus of defendant, The Columbus Mutual Life Insurance Company belongs to the holders of its participating policies or policies on the mutual plan. Defendants admit that under the present provisions of such Article V dividends on the common stock of defendant, The Columbus Mutual Insurance Company, are limited to 10% and that in the event of the conversion of said company from a stock company to a mutual company, the amount at which its stock may be redeemed or retired is $200.00 per share. Defendants deny that plaintiffs and the policyholders in whose behalf they bring this action are legally the owners of Columbus Mutual and deny that they are the equitable and beneficial owners of said company; but say that such ownership lies exclusively in its stockholders. Defendants deny that they have taken any action or carried on any activity for the purpose or objective of taking anything whatever away from its policyholders which belongs to them, or exercising Ohio State's voting control of Columbus Mutual's stock so to do.

10. Defendants admit the allegations contained in the tenth paragraph of the amended complaint.

11. Defendants admit the allegations contained in the eleventh paragraph of the amended complaint, except the allegation that the effect of the action of The National Association of Insurance Commissioners determining the value at which Columbus Mutual stock should be carried on the books of Ohio State has been to reduce the surplus of Ohio State by $4,805,990.00, which allegation defendants deny.

12. Defendants admit the allegations contained in the twelfth paragraph of the amended complaint.

13. Defendants admit the allegations contained in the thirteenth paragraph of the amended complaint.

14. Defendants admit the allegations contained in the fourteenth paragraph of the amended complaint.

15. Defendants admit the allegations contained in the fifteenth paragraph of the amended complaint.

16. Defendants admit the allegations contained in the sixteenth paragraph of the amended complaint.

17. Defendants admit the allegations contained in the seventeenth paragraph of the amended complaint.

18. Defendants deny the allegations contained in the eighteenth paragraph of the amended complaint.

19. Defendants admit the allegations contained in the nineteenth paragraph of the amended complaint.

20. Defendants admit the allegations contained in the twentieth paragraph of the amended complaint, except that defendants deny that the surplus of Columbus Mutual belongs to its policyholders and say that said surplus belongs to its stockholders.

21. Defendants deny the allegations contained in the twenty-first paragraph of the amended complaint.

22. Defendants admit the requirements of Article V of its articles of incorporation and the compliance therewith, in the issuance of its outstanding stock, but deny that the statements as set forth on the face of the outstanding stock certificates in any way constitute evidence of any contractual obligation for the benefit of any policyholders of Columbus Mutal, and deny that the surplus of Columbus Mutual belongs to any of its policyholders.

23. Defendants admit the allegations contained in the twenty-third paragraph of the amended complaint.

24. With reference to the allegations contained in paragraph twenty-four of plaintiff's amended complaint, defendants admit that the word "mutual" appears in the name of Columbus Mutual and deny that Columbus Mutual has ever held itself out to the public, to prospective policyholders, or to its policyholders as a mutual life insurance company. Defendants admit that Article V of Columbus Mutual's articles of incorporation were in full force and effect when each and every policy now in force was issued by said company. Defendants admit that in its annual statements, prior to 1956, filed with the Superintendent of Insurance of the State of Ohio, Columbus Mutual has been asked and has so answered the question set forth in paragraph 24 of said amended complaint. Defendants further state that they have no knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in paragraph twenty-four of the amended complaint.

25. Defendants admit the allegations contained in the twenty-fifth paragraph of the amended complaint, except the allegation that Columbus Mutual's surplus belongs to its policyholders, which allegation defendants deny.

26. Defendants admit the allegations contained in the twenty-sixth paragraph of the amended petition, except the

allegations with respect to reserves which Columbus Mutual carries on its books as constituting part of its surplus, which defendants deny and say that such reserves are properly carried on its books with the approval of the Superintendent of Insurance of Ohio for the protection and benefit of all of its policyholders, and defendants deny that any of said company's surplus belongs to its policyholders.

27. Defendants admit the allegations contained in paragraph twenty-seven of the amended complaint, except the allegation that all of the assets of Columbus Mutual in excess of $500,000 paid-in capital have been accumulated from the premiums paid by Columbus Mutual's policyholders, which allegation defendants deny; and defendants say that a substantial portion of said assets have been derived not from the premiums paid by policyholders, but from earnings upon investments made under the direction of the directors of Columbus Mutual who are elected by its shareholders and not by its policyholders. Defendants further deny the allegation contained in paragraph twenty-seven of the amended complaint to the effect that 99.54% of the assets of Columbus Mutual will belong to Ohio State if the plan and program of defendants, as therein set forth, is consummated, and say that whatever interest Ohio State may have in the assets of Columbus Mutual either before or after the merger of the two companies, that interest will be subject to and limited by the express provisions of the proposed amendment to Article V of the articles of Columbus Mutual, and to the actual liabilities of said company.

28. Defendants admit the allegations contained in paragraph twenty-eight of the amended complaint, except the allegation that the true surplus of Columbus Mutual belongs to the policyholders, which allegation defendants deny.

29. Defendants deny the allegations contained in the twenty-ninth paragraph of the amended complaint.

30. Defendants admit that their plan and program is to amend the provisions of Article V of the articles of incorporation of Columbus Mutual, but deny the other allegations contained in paragraph thirty of the amended complaint.

31. Defendants admit the allegations contained in the thirty-first paragraph of the amended complaint to the effect that the purpose of the amendment of said Article V is to conform the corporate structure of Columbus Mutual with that of Ohio State to facilitate merger of the two companies, but deny that the effect of such amendment will be to increase the net worth of Ohio State and deny that Columbus Mutual belongs to its policyholders, and also deny that the objective of defendants is to convert Columbus Mutual into a pure stock company, for the reason that Columbus Mutual is now and always has been a stock company.

32. Defendants deny the allegations contained in the first paragraph of the thirty-second numbered paragraph of the amended complaint.

(a) Defendants deny the allegations contained in paragraph 32 (a) of the amended complaint.

(b) Defendants deny the llegations contained in paragraph 32 (b) of the amended complaint.

(c) Defendants deny the allegations contained in paragraph 32 (c) of the amended complaint.

(d) Defendants deny the allegations contained in paragraph 32 (d) of the amended complaint.

(e) Defendants deny the allegations contained in paragraph 32 (e) of the amended complaint.

(f) Defendants deny the allegations contained in paragraph 32 (f) of the amended complaint.

(g) Defendants deny the allegations contained in paragraph 32 (g) of the amended complaint.

(h) Defendants deny the allegations contained in paragraph 32 (h) of the amended complaint.

(i) Defendants deny the allegations contained in paragraph 32 (i) of the amended complaint.

(j) Defendants deny the allegations contained in paragraph 32 (j) of the amended complaint, and say that the surplus of Columbus Mutual belongs to its stockholders and has always belonged to its stockholders.

(k) Defendants deny the allegations contained in paragraph 32 (k) of the amended complaint.

(l) Defendants deny that the surplus of the company has ever belonged to its policyholders and say that they have no knowledge or information sufficient to form a belief as to any future surplus of the company, or as to any future profits or losses arising from the conduct of its business, and further say that defendants are not now and never have been under any legal obligation to create or maintain a surplus, and say further that the policyholders will have no interest in any future surplus which might be maintained or earned other than that which they now have in the present surplus; to-wit, the right to receive dividends therefrom as declared by the directors.

(m) Defendants deny the allegations contained in paragraph 32 (m) of the amended complaint for the reason that the policyholders do not now own the assets of the company.

(n) Defendants deny the allegations contained in paragraph 32 (n) of the amended complaint.

(o) Defendants deny the allegations contained in paragraph 32 (o) of the amended complaint.

(p) Defendants deny the allegations contained in paragraph 32 (p) of the amended complaint.

(q) Defendants deny the allegations contained in paragraph 32 (q) of the amended complaint.

(r) Defendants deny the allegations contained in paragraph 32 (r) of the amended complaint.

(s) Defendants admit the allegations contained in paragraph 32 (s) of the amended complaint, except the allegation that the stockholders will be unjustly enriched in the event of both the dissolution and liquidation of Columbus Mutual and the allegation that such property now belongs to the policyholders which allegations defendants deny.

(t) Defendants admit the allegations contained in paragraph 32 (t) of the amended complaint, except the allegation that the stockholders will be unjustly enriched in the event of both dissolution and liquidation of the Columbus Mutual, which defendants deny.

(u) Defendants deny the allegations contained in paragraph 32 (u) of the amended complaint.

(v) Defendants admit the allegations contained in paragraph 32 (v) of the amended complaint, except the allegation that the amendment does not prohibit the use of the so-called "special surplus" for retirement or redemption of any of its stock, which allegation defendants deny.

(w) Defendants deny the allegations contained in paragraph 32 (w) of the amended complaint.

33. Defendants deny the allegations contained in the thirty-third paragraph of the amended complaint.

Defenses

34. For a first, separate and distinct defense, defendants allege that each and every policy of insurance issued by Columbus Mutual from the date of its incorporation to January 1, 1909, contained the following statement:

> "This policy constitutes the entire contract between the parties and shall be incontestable from its date except for non-payment of premiums and except as otherwise provided in this policy."

and each and every policy of insurance issued by the Columbus Mutual on and subsequent to January 1, 1909, to date, contained the following statement as required by law:

"This policy and the application therefor, a copy of which is attached to and made part hereof, constitute the entire contract between the parties."

35. For a second, separate and distinct defense, defendants allege that beginning in the year 1908, when Columbus Mutual's first policy was issued, to the present time, it issued, and is still issuing, participating policies of life insurance providing for policyholder participation in the surplus of the company which participation clauses in its policies have over the years hereinafter designated provided as follows:

1909-1911 "Participation. This policy shall participate in the surplus of the Company, and beginning not later than the end of the first policy year the Company will annually determine and account for the portion of the dividible surplus accruing hereon."

1911-1914 "Participation. This policy shall participate in the surplus of the Company, and beginning not later than the end of the second policy year the Company will annually determine and account for the portion of the divisible surplus accruing hereon."

1914-1918 "Participation. This policy shall participate in the surplus of the Company, and beginning not later than the end of the second policy year the Company will annually determine and account for the portion of the divisible surplus accruing hereon."

1918-1948 "Dividends. This policy shares annually in the profits of the Company, as follows: The proportion of divisible surplus accruing on this policy shall be determined annually commencing with the first year. Upon payment of premiums for the second and third years, and upon each anniversary thereafter, such surplus as shall have been apportioned by the Company to this policy shall at the option of the beneficiary be either * * * (here follows options as to each payment's application toward payment of premiums, etc.)"

1948-1958 "Annual Participation. This policy shares in the divisible surplus at the end of each policy year as apportioned by the Company, but payment of the first and second dividends shall be contingent upon payment of the premium for the second and third policy years, respectively."

Defendants say that the foregoing clauses contained in Columbus Mutual's participating policies constitutes the sole reference in such policies to the surplus of the Company and that no policy of life insurance ever issued by Columbus Mutual has ever contained any reference to Article V of its Articles of Incorporation or to any of the provisions thereof.

36. For a separate and distinct defense arising upon the face of the amended complaint herein, defendants say that the facts alleged in said amended complaint are insufficient to state a claim upon which relief can be granted for the following reasons:

(a) Columbus Mutual having been incorporated under the laws of Ohio as a stock life insurance company in 1906 as alleged in the amended complaint, has never seen fit to convert or reorganize as a mutual life insurance company, under the mutualization statutes first enacted in 1937, and as an Ohio stock company, under Ohio law the entire ownership of the company, including its surplus, the entire voting rights, management and control of the corporation has been, since its incorporation and still is, exclusively vested in its stockholders.

(b) Under Article XIII, Section 2 of the Ohio Constitution as adopted in 1851 and still in full force and effect, Columbus Mutual has the constitutional right, through its directors and stockholders, to amend its charter as provided by resolution of its stockholders of October 28, 1957, set forth in paragraph sixteen of the amended complaint.

(c) The restrictions of Article V of the articles of incorporation of Columbus Mutual pertaining to stockholder dividends neither create nor confer any rights in or upon policyholders, and said restrictions may be freely amended by the stockholders under the Constitution and laws of Ohio.

(d) The provisions of said Article V for retiring the stock at $200.00 per share neither creates nor confers any rights in or upon policyholders, and said provision may be freely amended by the stockholders under the Constitution and laws of Ohio.

(e) The provision of said Article V that the surplus of the company "shall belong to holders of policies on the mutual plan" relates only to the rights of policyholders in and to the company's surplus after the retirement of all of the company's stock and after the mutualization of said company. Article V imposes no duty nor obligation upon the directors to retire said stock or to mutualize the company prior to the retirement of said stock; rather the retirement of stock is within the sole discretion of the directors and consequently unless and until said directors in their sole discretion, retire said stock and mutualize said company, the policyholders have no right, title or interest in or to said surplus other than such portion thereof as may be apportioned to their policies by the directors in their sole discretion, and the provision may be freely amended by the shareholders under the Constitution and laws of Ohio.

(f) So-called mixed or half stock and half mutual life insurance companies are unknown in Ohio and such corporate structures were neither authorized nor recognized by Ohio law at the time Columbus Mutual was incorporated, nor have they been since.

(g) The complaint discloses on its face that this action is an effort on the part of the participating policyholders of

Columbus Mutual, who have invested no capital in this business, who have had nothing to do with its management and conduct, and who have no ownership or interest in the company other than set forth in their contracts of insurance, to capture and convert unto themselves ownership of this company from its stockholders—stockholders who have invested their capital in this business, who have been solely responsible for its management and success, and who own it. There is no allegation in the amended complaint, nor could there be, that there has been any mismanagement or default on the part of this company's directors in constantly providing for its policyholders the protection and security called for by their policies, which is all the policyholders contracted for.

Counter Claim

Wherefore, defendants pray—

(1) That this court render its judgment herein declaring as follows:

(a) That the surplus of Columbus Mutual belongs to its stockholders and that the policyholders of Columbus Mutual, by virtue of the express provisions of their respective contracts of insurance with said company and the laws of the State of Ohio, have no right, title or interest in or to said surplus except for such portion of said surplus as the directors of Columbus Mutual, in their sole discretion, may apportion to said policyholders in the form of policy dividends.

(b) That the proposed amendment to Article V of the articles of incorporation of Columbus Mutual, as adopted by its stockholders on October 28, 1957, is a lawful amendment, authorized by Section 1701.69 of the Revised Code of Ohio.

(c) That said proposed amendment to Article V of the articles of incorporation of Columbus Mutual, as adopted

by its stockholders on October 28, 1957, is in accordance with the laws and Constitution of the United States and of the State of Ohio.

(d) That in authorizing said proposed amendment of Columbus Mutual's articles of incorporation, Section 1701.69, Revised Code, impairs no obligation of contracts and does not violate Article I, Section 10, of the Constitution of the United States, nor Article II, Section 28, of the Constitution of Ohio.

(e) That in authorizing said proposed amendment to the articles of incorporation of Columbus Mutual such Section 1701.69 is not in violation of the XIV Amendment of the Constitution of the United States.

(f) That no program, plan or proposal of defendants are in violation of Article I, Section 1 of the Constitution of Ohio.

(g) That no program, plan or proposal of defendants are in violation of Article I, Sections 16 and 19 of the Constitution of Ohio.

(h) That the stockholders of Columbus Mutual have full power and authority to amend said Article V as aforesaid.

(i) That the holders of participating policies or policies on the mutual plan of Columbus Mutual are estopped by the express terms of their insurance contracts as set forth in their policies to claim any ownership in the surplus of Columbus Mutual, other than such portion of said surplus as has, or may in the future be, apportioned to said policyholders by the director of Columbus Mutual.

(j) That the stockholders of Columbus Mutual have a legal right to amend Article V of the articles of incorporation of said company under the Constitution and laws of Ohio.

(k) That the rights of participating policyholders with respect to apportionment and distribution of the surplus of

Columbus Mutual are expressly and exclusively set forth in their respective participating policies.

(l) That Article V of the articles of incorporation of Columbus Mutual neither creates nor confers any vested rights of property or contract in or upon the policyholders of said company.

(m) That the proposed amendment as a preliminary step toward possible eventual merger of Columbus Mutual and Ohio State is lawful and constitutional because:

(1) Columbus Mutual policyholders have no right under the law to have it converted into a mutual company composed of its policyholders since such action is solely in the first instance under the law in the discretion of its board of directors, who are under the law elected by its stockholders and not its policyholders.

(2) The adoption of the proposed amendment will not in any way prevent the merger commission prescribed by Section 3907.11, Revised Code, from protecting the interests of Columbus Mutual's policyholders.

(3) The adoption of the proposed amendment is authorized by law regardless of whether or not subsequent contemplated merger proceedings may be instituted and consummated.

(4) The adoption of the proposed amendment in anticipation of the commencement of merger proceedings will safeguard the interests of Columbus Mutual's participating policyholders as provided by Section 3907.11, Revised Code, because it provides greater future protection to such policyholders than they presently enjoy.

(5) The carrying out of the plan and program of merger will in no way effect distribution of surplus of Columbus Mutual's policyholders to which they are entitled in the form of dividends, but will further secure and protect such distributive rights.

(n) The proposed amendment has no effect on any vested property or contract rights of Columbus Mutual's policyholders and such policyholders have no statutory right to vote on the question of amending the company's articles of incorporation.

(o) The "special surplus" provided for in the proposed amendment may not be used for retirement of any stock.

(p) Article V of the articles of incorporation of Columbus Mutual impose no mandatory duty or obligation upon either the directors or the stockholders to mutualize the company, such conversion being purely a discretionary matter under the articles and the law of Ohio.

(q) The director and stockholders of Columbus Mutual have full constitutional authority to amend the company's articles and full statutory authority to merge the company with Ohio State.

2. That this court deny the prayer of plaintiffs as set forth in their amended complaint.

3. That this court grant to the defendants such other and further relief as to the court may seem just and proper in the premises and so as to make effective the declaratory judgment rendered in this cause, together with defendants' costs and disbursements, and that plaintiffs be required to pay the same.

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Of Counsel:
Bricker, Marburger, Evatt & Barton.

[Duly verified.]

REPLY

[Filed March 31, 1958.]

For their reply to the answer and counterclaim of the defendants, the plaintiffs:

1. Admit the allegations contained in the thirty-fourth paragraph of the answer and counterclaim;

2. Admit the allegations contained in the thirty-fifth paragraph of the answer and counterclaim;

3. Deny, each and every, all and singular, the allegations contained in the thirty-sixth paragraph of the answer and counterclaim and in subparagraphs 36 (a) through 36 (g), both inclusive thereof, and each of them;

4. Deny, each and every, all and singular, the statements contained in said answer and counterclaim, save and except such as are herein expressly admitted to be true.

Wherefore, plaintiffs renew the prayer of their amended complaint.

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Of Counsel:
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[Duly verified.]

AMENDMENT OF ANSWER

[Filed March 31, 1958.]

Defendants, as of course, in accordance with Rule 15 (a) of the Federal Rules of Civil Procedure, amend their answer in the above entitled cause and strike all of paragraph 24, page 3, thereof, and insert in place therefor the words:

"24. With reference to allegations contained in paragraph twenty-four of the Amended Complaint, defendants admit that the word 'Mutual' appears in the name of the Columbus Mutual but deny that Columbus Mutual, through its officers, directors or management, has ever held itself out to the public, to prospective policyholders, or to its policyholders as a mutual company. Defendants admit that Article V of the Columbus Mutual's articles of incorporation was in full force and effect when each and every policy now in force was issued by said company. Defendants admit that in its annual statements, prior to 1956, filed with the Superintendent of Insurance of the State of Ohio, Columbus Mutual has been asked and has so answered the question set forth in paragraph twenty-four of the Amended Complaint. Defendants further admit that some of Columbus Mutual's policyholders may have become such policyholders in reliance upon the provisions and limitations of Article V and in reliance upon the representations that said company was a mutual life insurance company."

Dated, March 31, 1958.

William E. Evatt,
Attorneys for Defendants.

[Duly verified.]

FILE COPY

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No. 918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE OHIO STATE LIFE INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

RAY A. CLARK, ET AL.,

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

QUESTIONS PRESENTED

Respondents have misstated on page 3 of their brief what they term to be the immediate questions presented to the court. It is therein stated that the questions presented to this court by the petition for writ of certiorari is whether or not the proposed amendment to Article V of the charter of The Columbus Mutual Life Insurance Company (hereinafter referred to as "Columbus Mutual") may be legally adopted by the stockholders of this stock life insurance company. Petitioners clearly stated and emphasized to this court that they do not seek a review of the lower court's determination that under the present provisions of Article V, the participating or mutual plan policyholders of Columbus Mutual possess a vested bene-

ficial interest in the company's entire existing surplus, and all of the existing profits reflected in its voluntary reserves. The sole point upon which a review is sought by this court is the judgment of the District Court, affirmed by the Court of Appeals, enjoining these stockholders from adopting any amendment to Article V which would affect the participating policyholders' "vested right of contract in and to the company's *future* and as yet unearned surplus and profits". The entire petition is directed solely to this single point. Obviously, since the proposed amendment before the court dealt solely with the surplus of the company, it could not now be lawfully adopted, because the Court of Appeals held that respondents not only have a vested beneficial interest in the entire surplus, but also in the profits represented by voluntary reserves.

There is no basis whatever for the contention of respondents that the stockholders of Columbus Mutual intend "to deprive Columbus Mutual's policyholders of its surplus", or that the stockholders of Columbus Mutual are trying to deprive the existing policyholders of all their rights to the existing surplus so that it would belong to the policyholders. The decision of the lower courts in so far as it holds that these policyholders not only own beneficially the entire existing surplus, but also the existing profits represented by voluntary reserves, is not sought to be reviewed by this petition.

It is the injunction of the courts below preventing the stockholders of Columbus Mutual from ever relieving their stock of its present restrictions as to *future and as yet unearned profits*, which presents an extremely farreaching question of corporate law. In petitioning this court to rule upon this question and this question only, petitioners are not, as alleged by respondents, asking this court to rule "in a vacuum" or to "render an advisory opinion".

The single issue raised by this petition should not be obscured by arguing about the proposed amendment or who owns the existing surplus and existing profits represented by voluntary reserves. Those points have been decided, and this court is not asked by petitioners to review them.

This court is asked to review the vital principles of corporate and constitutional law upon which the lower court's injunction against the stockholders of Columbus Mutual must necessarily stand.

ARGUMENT

In view of the foregoing statement, it is only necessary to comment briefly upon Points B, C, D and E of respondents' argument.

Respondents' Points B and C, That Article V Precludes the Stockholders from Relieving their Stock of Restrictions with Respect to Future and as yet Unearned Profits.

Respondents place great emphasis upon the fact that each stock certificate of Columbus Mutual bears on its face the statement that it is issued and accepted subject to the terms and conditions of the Articles of Incorporation to which reference is made. The answer to this argument is that under Ohio law, as held by the Supreme Court of Ohio, every stock certificate issued by every corporation is a contract between the corporation and the holders of stock certificates and every stockholder by becoming such, consents to the terms and conditions of the Articles of Incorporation. In the case of *Geiger v. Seiding Mach. Co.*, 124 O. S., 222, syllabus No. 3 (which states the law of the case) reads as follows:

> "3. A stock certificate issued by a corporation is a contract between the corporation and the holders of certificates of all classes of stock. By subscription to stock of any class, the subscriber consents to conditions of the articles of incorporation and becomes a party to the contracts of each class."

The legend appearing on each stock certificate of Columbus Mutual is but declarative of the law of Ohio. There is no contract here against purely prospective amendments of the charter, nor could there be under the Ohio constitutional reserved power to amend.

Respondents' Point D.

In stating what the lower courts held in this case (page 17 of their brief), respondents failed to set forth the one holding sought to be reviewed, to-wit, that these policyholders have a vested contractual right to future profits as yet unearned. Only on page 19 of respondent's brief is comment made upon the question of vested beneficial ownership of future profits. Here the theory is advanced that most, if not all, of future profits will come from the aggregate over-charges of premiums against these policyholders, and that therefore, any amendment which would appropriate such contingent future profits to the unrestricted use of the stockholders would not be "entirely prospective in operation".

Resopndents seem to take it for granted that the level rate premiums which they must pay on their policies will inevitably in the future create additional profits; a purely speculative assumption. Premiums on existing policies, as well as those upon policies hereafter written may or may not create profits in the future, depending upon continuing efficiency of management (something in which these policyholders have no voice). Contingent future profits also depend upon economic conditions, epidemics, and innumerable other unforeseen events which might affect longevity. Respondents have cited no single authority for the proposition that participating policyholders of a stock life insurance company have a vested contractual beneficial interest in future and as yet unearned profits derived from the conduct of the business. If they have, as pointed out in our petition, every law of every state authorizing the conversion of a purely mutual insurance company into a stock company is unconstitutional.

If, as respondents contend, policyholders may be said to have a vested contractual interest in their premiums which they pay under the terms of their policies, such rights would be contractual policy rights arising out of their contracts of insurance. As recognized by the Court of Appeals in its decision, every insurance policy of every policyholder of Columbus Mutual contains an express provision that the policy constitutes the entire contract between the company and the policyholder. No policy ever issued by Columbus Mutual has ever contained any reference to the charter or to Article V. The court below held that the policyholder rights to the surplus and profits are not acquired under policy provisions but under the charter. For respondents now to argue that policyholder rights in future profits arise out of premiums which they contracted to pay under their policies, is to admit that such rights arise under their policies instead of the charter. If future rights to future unearned profits arise out of the contracts of insurance set forth in their policies, they do not exist, because the policies, which contain the entire contract, make no mention of the charter.

Respondents' Point E, that "The Proposed Amendment" Would Deprive Policyholders of Vested Rights.

Here again respondents are avoiding the sole point raised by this petition by arguing about the proposed amendment. Respondents cite and discuss at some length what they call "the land-mark case" of *Huber v. Martin*, 127 Wisc. 412. That case involved a mutual company whose policyholders were its only members. They objected, and rightly so, to an attempt to convert the company to a stock company under an ineptly drawn state statute which, in that instance, was being employed to further a scheme of conversion whereby the policyholders who owned the com-

pany would have wound up with approximately 10% of the stock of the new company and the other 90% of the stock would have been given principally to the promoters of the scheme and to ex-policyholders who were no longer members of the company. This case has no bearing whatsoever upon the right of stockholders of Columbus Mutual to amend their charter prospectively with respect to future and as yet unearned profits.

CONCLUSION

In conclusion, we submit that although these petitioners feel that the lower courts erred in conferring beneficial ownership upon respondents of the entire existing surplus and profits of Columbus Mutual upon its participating policyholders, they are not asking this court to review such decision.

Petitioners do respectfully ask this court to review the judgment of the court below only to the extent that it holds that Columbus Mutual has by Article V of its charter contracted with its participating policyholders so as forever to vest in such policyholders third party contractual rights in future contingent and as yet unearned profits: rights which may never be changed by amendment notwithstanding the Ohio constitutionally reserved power to amend.

This surplus and profits of some $19,000,000.00 was accumulated over the half century of Columbus Mutual's operations by judicious management elected by the stockholders; it grew not only from profit on premiums but from wise investment as well. It did not accure only from premiums paid by present policyholders, but also from premiums paid on thousands of policies long since matured.

All these millions now belonw to these present policyholders, and the stockholders ask no review of this grant.

In the name of justice, are these stockholders not entitled to a review of the decision which goes beyond all this and prohibits them from ever changing their financial structure as to future and unearned profits?

We submit that the petition should be granted.

Respectfully submitted,

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